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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

—o—

TERRY L. ARCOREN,

Petitioner,

v.

WENTON PETERS and JOHN SCHOOLER,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether the Respondent Farmers Home Administration officials violated Petitioner's clearly established due process rights when they repossessed and sold Petitioner's cattle in 1980 without establishing that he was in default on his security agreement and without providing him with notice and an opportunity to be heard?

2. Whether the qualified immunity defense should be available to a federal official who claims that the particular function he performed was not sufficiently "governmental" to be judged against the standards of the Fifth Amendment due process clause?

LIST OF PARTIES

The parties to this proceeding and to the proceedings below are the petitioner Terry L. Arcoren, and the respondents Wenton Peters and John Schooler.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

The petitioner Terry L. Arcoren respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on September 25, 1987.

—o—

OPINIONS BELOW

The en banc opinion of the Court of Appeals for the Eighth Circuit is reported at 829 F.2d 671 and is reprinted

in the appendix hereto, p. 1a, *infra*. The panel opinion of the Court of Appeals for the Eighth Circuit is reported at 811 F.2d 392, and is reprinted in the appendix hereto, p. App. 30, *infra*.

The memorandum decision of the United States District Court for the District of South Dakota (Porter, J.) is reported at 627 F.Supp. 1513 and is reprinted in the appendix hereto, p. App. 48, *infra*.

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JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331 and directly under the Fifth Amendment of the United States Constitution, the petitioner brought suit in the United States District Court for the District of South Dakota. On February 13, 1986, the District Court granted the respondents' motion for summary judgment, concluding that petitioner's claims were barred by qualified immunity, and dismissed the action. See p. App. 48, *infra*.

On petitioner's appeal, a three member panel of the United States Court of Appeals for the Eighth Circuit on February 2, 1987, reversed the District Court. Respondents petitioned for rehearing and on September 25, 1987, the Eighth Circuit, en banc, vacated the panel decision and held that the respondents were immune from suit.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment of the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Prior to March, 1980 the petitioner was a rancher on the Rosebud Sioux Indian reservation. In 1976 and 1978 the petitioner received two operating loans from the Farmers Home Administration (hereinafter FmHA). The loans were used to purchase cattle and a bull which were then pledged to the FmHA as collateral for the loans.

During the winter months the petitioner pastured his cattle upon his uncle, John Arcoren, Sr.'s, Indian trust land and upon the land of a neighbor, Richard Hand, pur-

suant to an agreement the three parties had entered into. On March 17, 1980, Hand and John Arcoren, Sr. visited respondent Peters, a county supervisor for the FmHA, in his office in White River, South Dakota, and alleged that the petitioner was not caring for his cattle properly and that they intended to turn them out on the road. Respondent Peters made no attempt to corroborate these allegations nor did any other FmHA employee.

More than a week passed when Hand and John Arcoren, Sr. returned to respondent Peters' office on March 25, 1980. On this visit, the two notified respondent Peters that they had corralled the petitioner's cattle to enable the FmHA to repossess them. Respondent Peters contacted respondent Schooler, the District Director for FmHA, and they decided to repossess the petitioner's cattle. Petitoner at the time was current on his annual payments to the FmHA and had not abandoned his cattle.

On March 27, 1980 a local trucker, at the direction of the respondents, took the petitioner's cattle to the Winner Livestock auction and sold them. The petitioner did not become aware of the reposession of his cattle until April 1, 1980, when he received a receipt from the auction yard for the sale. The money from the sale was applied to petitioner's outstanding indebtedness and on April 28, 1980, the FmHA sent the petitioner a notice of acceleration.

After unsuccessfully pursuing an FmHA administrative appeals process, the petitioner brought an action under the due process clause of the Fifth Amendment to the United States Constitution in the United States District Court for the District of South Dakota seeking declaratory relief and damages against the respondents. Originally the District Court dismissed the action for failure to state a

claim holding that the FmHA administrative appeals process afforded the petitioner the process he was due and that the availability of the appeals process supplanted petitioner's right to bring a *Bivens*-type action, utilizing this Court's rationale in *Bush v. Lucas,* 462 U.S. 367, 102 S.Ct. 2404, 76 L.Ed. 2d 648 (1983). *Arcoren v. Schooler,* Civ. 83-3017, (D.S.D. Nov. 2, 1984). The United States Court of Appeals for the Eighth Circuit reversed that dismissal and remanded to the District Court for further proceedings. *Arcoren v. Farmers Home Administration,* 770 F.2d 137 (8th Cir. 1985).

On remand the respondents moved for summary judgment contending they were absolutely immune from suit under this Court's analysis in *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed 2d 128 (1976), or in the alternative were entitled to qualified immunity under *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982). The petitioner resisted the motion and submitted an affidavit in which he denied the allegations made by Hand and John Arcoren, Sr. that he had not been caring for his cattle properly. Notwithstanding the existence of a factual dispute as to whether the petitioner had defaulted on the security agreement, the District Court granted the respondents' motion for summary judgment holding that the petitioner did not have a clearly established due process right to notice and the right to be heard at the time his cattle were taken and sold. *Arcoren v. Peters,* 627 F. Supp. 1513 (D.S.D. 1986). On appeal a panel of the United States Court of Appeals for the Eighth Circuit reversed the District Court. *Arcoren v. Peters,* 811 F.2d 392 (8th Cir.1987). The panel held that several prior decisions of this Court, including *Mullane v. Central*

Hanover Bank, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972), and *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970), coupled with the statutory objectives of the farm relief legislation giving birth to the FmHA, established a clear constitutional right to notice and an opportunity to be heard before a FmHA borrower's livestock could be involuntarily liquidated. The panel also noted that affording the petitioner notice and an opportunity to be heard were particularly essential in the case at bar because of the uncorroborated rumors the respondents acted upon to repossess petitioner's cattle.

An en banc United States Court of Appeals reversed with Chief Justice Lay and Justice Heaney, who had been on the panel, dissenting. *Arcoren v. Peters,* 829 F.2d 671 (8th Cir.1987). The en banc Court did not necessarily disagree with the panel's decision that it was clearly established in 1980 that the due process clause of the Fifth Amendment to the United States Constitution required at a minimum notice and an opportunity to be heard before the deprivation of a property interest. Instead, the Court held that it was not clearly established in 1980 that the constitutional due process clause operated to curtail actions of FmHA officials when they acted pursuant to a security agreement and state law to repossess collateral upon an alleged default. To bolster that holding the court below relied upon this Court's decision in *United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 2d 711 (1979), and several lower court decisions, which held that non-judicial mortgage foreclosures by government subsidized commercial entities did not involve governmental action, as support for its conclusion that

there was no "constitutional right to prior notice and a hearing when the government acts in the capacity of a commercial lender pursuant to a security agreement." *Arcoren,* 829 F.2d, at 675.

In a dissenting opinion by Justice Heaney, and joined by Chief Justice Lay, the dissenters criticized the majority for upholding the qualified immunity defense in a case where the government officials were claiming that they acted in a non-governmental capacity.

REASONS FOR GRANTING THE WRIT

I

The decision below is in direct conflict with this Court's procedural due process decisions including Fuentes v. Shevin, Goldberg v. Kelly and Mullane v. Central Hanover Bank and presents an important constitutional question.

The en banc Court's holding below that the respondent federal officials' actions in taking the petitioner's cattle and selling them without notice to him nor an opportunity for him to respond to charges by third parties that he was neglecting the cattle in no way even implicated the Fifth Amendment due process clause is so patently violative of previous due process decisions by this Court that review by this Court is warranted. The decision below not only ignores the fundamental protections afforded citizens by the due process clause, but also misapplies the qualified immunity analysis adopted by this Court in *Harlow v. Fitzgerald.*

In *Harlow v. Fitzgerald* this Court held that government officials are entitled to qualified immunity from a suit for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738. In elaborating upon this standard in *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, — L.Ed. 2d — (1985), and most recently in *Anderson v. Creighton,* — U.S. — 107 S.Ct. 3034, — L.Ed. 2d — (1987), this Court stated:

> ". . . our cases establish that the right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of preexisting law that unlawfulness must be apparent."

Anderson, 107 S.Ct. at 3039.

The issue therefore presented to the Court below was whether the Respondents' actions were unlawful in light of the preexisting decisions by this Court concerning the due process rights of debtors, the most important being *Fuentes v. Shevin.* Instead of addressing this issue, the Court below held that in 1980 FmHA borrowers had no due process rights vis a vis FmHA officials because the federal constitution in no way proscribes the actions of FmHA when they act in the capacity of a commercial lender. To support this novel proposition, the Court relied upon several lower court decisions holding that self-

help repossessions and non-judicial mortgage foreclosures by advertisement by *private parties* did not involve sufficient governmental action to implicate the constitutional due process clause. At the dissenters correctly point out, those decisions are totally inapposite because they involve cases where insufficient governmental action was found whereas in the case at bar the individuals who deprived the petitioner of his property were themselves government officials.

Ironically, the Court below relied upon this Court's decision in *United States v. Kimbell Foods, Inc.,* as support for its conclusion that the FmHA acts as a commercial lender whose rights and liabilities are determined by state law. The use of *Kimbell Foods* by the Court below distorts this Court's holding there. If anything, *Kimbell Foods* points out the error in the Court's reasoning below.

In *Kimbell Foods* this Court, utilizing the analysis set out in *Clearfield Trust Co. v. United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943), held that it was not necessary for federal courts to adopt special federal rules to determine the relative priority of Small Business Administration and FmHA liens to protect vital federal interests and that state commercial laws would suffice. In no way did this Court hold that the FmHA was not performing a governmental function when it loaned money and collected debts. As this Court stated:

> "The SBA and FHA unquestionably perform federal functions within the meaning of *Clearfield.* Since the agencies derive their authority to effectuate loan transactions from specific Acts of Congress . . . . in the exercise of a *constitutional function or power,* their rights, as well, should derive from a federal source.

Kimbell Foods, 440 U.S. at 726, 99 S.Ct. at 1457 (citations and footnote omitted) (emphasis added).

Certainly if the FmHA derives its rights from the exercise of a constitutional function, its actions should be judged against the background of that great document. As this Court held long ago in *Clearfield Trust:*

> "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power . . . The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]. *The duties imposed upon the United States and the rights acquired by it* . . . find their roots in the same *federal sources.*"

Clearfield Trust, 318 U.S. at 336, 63 S.Ct. at 575.

Even though *Kimbell Foods* was decided only one year before the respondents took the action which led to the commencement of this lawsuit, the Court below held that there was no law in 1980, or even today, which established that FmHA was anything other than a commercial lender. This Court itself stated that the FmHA lending program is "a form of social welfare legislation primarily designed to assist farmers that cannot obtain funds from private lenders on reasonable terms", *Kimbell Foods,* 440 U.S. at 735, 99 S.Ct. at 1462, a mere one year before the respondents sold the petitioner's cattle without notice to him. The decision of the Court below offends this Court's holding in *Kimbell Foods.*

The decisions of this Court construing the due process clauses of the Fifth and Fourteenth Amendments as requiring notice and an opportunity to be heard before a property right is taken were clear and unequivocal in 1980. Beginning with *Mullane v. Central Hanover Bank and Trust Co.* and culminating in the seminal case of *Fuentes*

v. Shevin, this Court has continually cautioned federal and state officials that the cornerstone of the due process guarantees of the Fifth and Fourteenth Amendments is notice and the opportunity to be heard by those whose property rights are to be affected. *Fuentes,* 407 U.S. at 79, 92 S.Ct. at 1993. Of special import are two cases which immortalized these two constituents of due process jurisprudence and which defy the respondents' contention that they could summarily deprive the petitioner of his property with impunity. Those cases are *Goldberg v. Kelly* and *Fuentes v. Shevin.*

In *Goldberg* this Court held that the due process clause of the Fourteenth Amendment prevented state officials from terminating public assistance to eligible recipients without a pre-termination hearing to determine the propriety of the termination. Responding to an argument that a post-deprivation hearing would suffice, this Court held that pre-termination hearings are important "in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Goldberg,* 397 U.S. at 268, 90 S.Ct. at 1020. In the context of the public assistance program involved there the right to a pre-deprivation hearing assumed a special importance because of the "individual's overpowering need in this unique situation not to be wrongfully deprived of assistance." *Goldberg,* 397 U.S. at 261, 90 S.Ct. at 1017.

Despite the obvious parallels between the AFDC program involved in *Goldberg* and the federal loan programs administered by the FmHA, the Court below apparently

found *Goldberg* to be of no import in determining the question before it. This omission is indefensible. Only one year before the respondents summarily deprived the petitioner of his livelihood, this Court recognized that FmHA lending programs are primarily a form of social welfare legislation.[1] *United States v. Kimbell Foods, Inc.,* was not an obscure decision; the respondent FmHA officials were surely aware of this Court's decision before they acted in 1980.

This is not to say that all the pre-deprivation procedural requirements that *Goldberg* requires in the AFDC context would be relevant in this type of case. However, just as in *Goldberg,* the opportunity to be heard prior to the deprivation of his livestock was of vital importance to the petitioner. The alleged default by the petitioner was based upon allegations by third parties made more than one week before the repossession. If the petitioner had been notified of these allegations, he could have cleared up any misunderstandings or corrected any false statements. The respondents have never taken the position in this litigation that an emergency situation existed which precluded them from notifying the petitioner of the third-party statements and giving him the opportunity to respond to them. The fact that a week lapsed between the time of the accusations and the deprivation would belie any such contention. *Goldberg* clearly established that a recipient of federal welfare assistance is entitled to a pre-deprivation

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1. This is borne out by the agricultural credit program administered by the FmHA. The FmHA is only authorized to make operating loans to farmers who are "unable to obtain sufficient credit elsewhere to finance their actual need at reasonable rates and terms . . . ." 7 U.S.C. § 1941(a)(4).

opportunity to be heard before any action terminating his assistance is taken. The Court's refusal below to even consider the impact of *Goldberg* upon its analysis of the status of the law of due process rights of FmHA borrowers in 1980 is blatant error and should be corrected by this Court.

Finally, and most critically, the Court's refusal below to analyze the issue of the Respondents' qualified immunity in light of this Court's holding in *Fuentes v. Shevin* achieves the intolerable result that in the Eighth Circuit government officials cannot facilitate the deprivation of property without notice and an opportunity to be heard *but they themselves can engage in that type of activity. Fuentes v. Shevin* controls this case; the decision below is an effrontery to *Fuentes* which this Court should not permit to stand.

In *Fuentes* this Court was considering the constitutionality of state pre-judgment replevin actions which permitted creditors to repossess property by use of state statutes which did not provide for notice to the debtors and an opportunity to be heard prior to the deprivation. This Court held the state statutes to be constitutionally deficient under the Fourteenth Amendment due process clause.

The only distinction between this case and *Fuentes* is that the facts presented here demonstrate an even more egregious due process violation than the state statutes in *Fuentes*. In *Fuentes,* the governmental taking was on behalf of a private creditor who applied to the court. In the case at bar, the government itself is seizing the property, selling it and paying the proceeds into the United

States treasury. This petition has already demonstrated that such action was governmental, despite the lower court's ruling to the contrary. In *Fuentes*, the taking was temporary and the debtor had the opportunity to retrieve the property pending a hearing by posting a bond. The deprivation here was *final* and the petitioner had no opportunity to retrieve the property because it was sold before he became aware of the taking.[2] In both cases, the takings were effected without any notice to the debtors and without any opportunity for the debtors to be heard.

Nothing could have been clearer to government officials after *Fuentes* then that property could not be taken, absent a public emergency,[3] without prior notice and an opportunity to be heard. The holding in *Fuentes* was applied to the FmHA in dealings with its borrowers in numerous cases prior to the events that gave rise to the petitioner's cause of action. *See, e.g., Ricker v. U.S.*, 417 F. Supp. 133 (D.Me.1976), *supplemented* 434 F. Supp. 1252

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2. Petitioner's cattle were also sold even though there was no established default by petitioner. The majority decision below is premised upon the petitioner being in default, yet this was a disputed fact in the District Court and the dispute should have been viewed in a light most favorably to petitioner. This Court's decision in *Harlow* did not in any way modify the standard for an appellate court to review the grant of a motion for summary judgment. *Harlow*, 457 U.S. at 816, f.n. 26, 102 S.Ct. at 2337.

3. This Court has recognized in several contexts that possible danger to the public outweighs the right to pre-deprivation notice and an opportunity to be heard, provided a post-deprivation hearing is held. *See, e.g., North American Cold Storage Co. v. Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908). *Ewing v. Mytinger Casselberry, Inc.*, 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950). This situation does not present that type of case.

(1976), (Court, relying upon *Fuentes*, held that FmHA officials were bound to observe due process requirements in effecting a mortgage foreclosure and sale); *United States v. White*, 429 F. Supp. 1245 (N.D.Miss.1977); *Law v. United States Department of Agriculture*, 366 F. Supp. 1233 (N.D.Ga.1973). Even in the United States District Court for the District of South Dakota, from which this case arose, there was an action pending in Federal District Court challenging the FmHA's actions in foreclosing on a mortgage without notice to the mortgagor on Fifth Amendment due process grounds at the time the respondents summarily deprived petitioner of his cattle. *See, Rau v. Cavenaugh*, 500 F. Supp. 204 (D.S.D.1980). In *Rau* the District Court, relying heavily upon *Goldberg v. Kelly*, held that the Fifth Amendment due process clause required adequate notice and an opportunity to be heard before the FmHA could foreclose upon a mortgage.

Admittedly, these cases and *Fuentes* itself did not explicitly strike down self-help repossession by government officials as unconstitutional. However as this Court has held in *Mitchell v. Forsyth* and *Anderson v. Creighton* whether an official action is protected by qualified immunity does not depend upon whether that very action has been held unlawful, but whether "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 107 S.Ct. at 3039. The fact that several courts had held that self-help repossession by private parties did not implicate the Fifth or Fourteenth Amendment due process clauses would not have led a reasonable official to believe that he could act in violation of the standards enunci-

ated in *Fuentes*. The lessons of *Fuentes* were sufficiently clear to government officials in 1980.

The Court below chose to ignore this Court's *Fuentes* decision and its progeny and to focus upon a series of decisions involving non-judicial mortgage foreclosures by the Government National Mortgage Association, formerly the Federal National Mortgage Association. In those decisions federal courts of appeals held that non-judicial mortgage foreclosures by the GNMA did not involve federal governmental action and therefore did not implicate the due process clause. *See, Warren v. Government National Mortgage Association,* 611 F.2d 1229 (8th Cir. 1980); *Roberts v. Cameron-Brown Company,* 556 F.2d 356 (5th Cir. 1977); *Northrip v. Federal National Mortgage Association,* 527 F.2d 23 (6th Cir. 1975). Incredibly, the Court below relied upon these decisions to support its conclusion that the FmHA is not bound by the due process clause when it liquidates a borrower's collateral. The GNMA cases involved action by private corporation regulated by the federal government whereas in the case at bar government officials themselves deprived the petitioner of his property. This was the very distinction the lower courts used in finding no governmental action in the GNMA decisions, yet the Court below has blurred this distinction in an attempt to avoid this Court's holding in *Fuentes*.

II

The decision below that the FmHA need not comply with the due process requirements of the Fifth Amendment when liquidating a borrower's collateral is in direct conflict with a decision of another Circuit Court and should be resolved by this Court.

Not only does the en banc Eighth Circuit's decision below deviate from this Court's procedural due process decisions, it also creates an intolerable conflict among the Circuit Courts of Appeals. The only other Circuit Court to address this particular issue prior to this decision held that this Court's analysis in *Fuentes* and *Goldberg* applies to FmHA officials when liquidating a borrower's collateral. This Court should grant certiorari to resolve this conflict.

The Eighth Circuit's decision below that *Fuentes* and *Goldberg* did not establish a borrower's "constitutional right to prior notice and a hearing when the government acts in the capacity of a commercial lender pursuant to a security agreement" stands in stark conflict with a decision of the United States Court of Appeals for the Eleventh Circuit.

In *Johnson v. United States Department of Agriculture*, 734 F.2d 774 (11th Cir.1984) the Court was considering the constitutionality of the FmHA's utilization of non-judicial foreclosure of mortgages in the state of Alabama. Alabama law permitted such foreclosures and the mortgage contracts executed by FmHA borrowers contained a power of sale clause authorizing such foreclosures. The class of plaintiffs in *Johnson* claimed that the use of non-judicial foreclosures violated their due process rights under the Fifth Amendment. In reversing the District

Court's denial of plaintiffs' motion for a preliminary injunction, the Court of Appeals held: 1) that *Goldberg* establishes that the FmHA borrowers have a property interest in their FmHA-mortgaged home and 2) that *Fuentes* establishes that this property interest cannot be taken without notice to the borrower and an opportunity to be heard. The Court explicitly rejected any notion that the FmHA could act as any other commercial lender oblivious to the mandates of the due process clause of the Fifth Amendment. It does not appear that the FmHA even attempted to promote the assertion that it was not bound by the *Goldberg* and *Fuentes* due process decisions when it liquidated collateral in *Johnson. Johnson,* 734 F.2d at 783.

Johnson and the decision below are in direct conflict. The *Johnson* Court held that this Court's decisions in *Goldberg* and *Fuentes* apply to the FmHA when they liquidate a borrower's collateral whereas the Court below explicitly rejected such a notion. The result is that FmHA borrowers in the states comprising the Eighth Circuit, most of which are rural agricultural states, have no due process rights vis a vis FmHA officials,[4] when those officials act to foreclose upon collateral. This is an intolerable situation which should be remedied by this Court.

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4. Petitioner recognizes that the Eighth Circuit's decision in *Allison v. Block,* 723 F.2d 631 (8th Cir.1983) gives FmHA borrowers *in monetary default* certain statutory rights to request a moratorium on their loan payments, pursuant to 7 U.S.C. § 1981 (a) (1982), and to be heard with respect to that request. *See also, Coleman v. Block,* 562 F. Supp. 1353 (D.N.D.1983). That opportunity is of no consolation to a borrower in petitioner's position who is not in default. He is entitled to no due process rights or statutory rights under the Eighth Circuit's analysis.

III

The Circuit Court's decision below deviates from this Court's qualified immunity cases and adopts reasoning explicitly rejected by this Court in Anderson v. Creighton.

As the dissenting opinion below cogently noted, the majority opinion below results in an unprecedented modification of the qualified immunity defense to allow the availability of the defense to turn upon the nature of the governmental conduct involved. The Court's reasoning that government officials should be immune from suit if their actions are not purely governmental in nature undermines the very premise upon which the defense rests and muddies the clear analysis invoked by this Court in its qualified immunity decisions.

This Court has adopted a "functional" approach to the question of what "immunities" should be available to a public official when sued for damages. This approach accommodates the competing interests of providing a viable damages remedy to protect the rights of citizens and the "need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed. 2d 895, 916 (1978). In striking that balance this Court has held that officials "whose special functions or constitutional status requires complete protection from suit" are absolutely immune from suit for damages. *Harlow v. Fitzgerald*, 457 U.S. at 807, 102 S.Ct. at 2732. Those absolutely immune include the President, *see, Nixon v. Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690, 73 L.Ed. 2d 349 (1982); judges performing judicial functions, *see, Stump v.*

Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed. 2d 331 (1978); and prosecutors and similar officials, *see, Butz v. Economou.*

For all other government officials performing discretionary actions, qualified immunity is an available defense if they can demonstrate that their actions "could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 107 S.Ct. 3038.

In brief, this Court's immunity decisions recognize two types of immunity. For officials performing special functions or functions of a constitutional nature, absolute immunity is available. For all other officials, qualified immunity is available. This Court has explicitly rejected any attempt to condition the type of immunity available upon the particular duty performed by a government official, except to determine whether absolute immunity should be permitted. Most recently, in *Anderson v. Creighton,* this Court, in rejecting an argument by the respondent there that an officer who conducts a warrantless search of a third party's home for a fugitive should never be entitled to qualified immunity because of the function he performed, held that:

> "[W]e have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated."

Anderson, 107 S.Ct. at 3040.

The Court below has ignored this admonition and has complicated the "functional" approach to immunity to which this Court has long adhered. Under the Court's

analysis below, an official's entitlement to qualified immunity depends upon whether the nature of his actions is sufficiently "private" so as to relieve him of an obligation to comply with the Constitution. Under this third type of immunity, if the function performed by the governmental official is quasi-private, his actions will be judged in accordance with the relevant state law, even if such actions clearly violate the Constitution. The frightening aspect of this immunity is that in light of this Court's holding in *Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed. 2d 139 (1984), that the violation of a regulation or statute does not deprive an official of the qualified immunity defense, this new immunity permits government officials to violate both constitutional and state commercial law requirements, while being immune from suit for either. The result is that the balance between the competing societal interests of deterring violations of clearly established constitutional rights and assuring conscientious government officials of protection from suits for the good faith performance of their duties is tipped in favor of the official who can plead that he believed his actions would be judged in accordance with state law.

The new type of immunity conjured up by the Court below neither gives government officials the "assurance of protection that is the object of the doctrine" of qualified immunity, *Anderson,* 107 S.Ct. at 3040-3041, nor does it provide a "realistic avenue for vindication of constitutional guarantees." *Harlow,* 457 U.S. at 814, 102 S.Ct. at 2736. Whether an action by a government official is pursuant to an exercise of sovereign authority or is tantamount to private action is not an easy matter to determine in this day of pervasive government regulation.

Certainly it should not be left to government officials and private citizens to determine how a Court will ultimately view the actions of an official. "An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that is the object of the doctrine to provide." *Anderson,* 107 S.Ct. at 3040-3041.

There is an even more fundamental flaw in the Court's qualified immunity analysis below. If the Court's major premise that the government officials were not acting in an official or sovereign capacity is accepted, the immunity defense should fail as a matter of law because it protects only official governmental action. The defense applies only to the exercise of "official authority." *Harlow,* 457 U.S. at 807, 102 S.Ct. at 2732, and not purely private actions. Therefore, if the actions of the respondents were pursuant to state law and in no way furthered the objectives of the United States government, there is no need to protect those actions by allowing a qualified immunity defense because there is no chance that *official governmental action* will be inhibited.

This Court should take this important opportunity to correct the Eighth Circuit's attempt to manipulate the qualified immunity defense and the Fifth Amendment due process clause to afford a special immunity status to government officials in an agency which has a monolithic existence in many of the states comprising the Eighth Circuit Court of Appeals. For citizens whose very livelihoods are dependent upon the operations of the FmHA and for officials of that agency this Court's "functional" approach to the qualified immunity defense represents the most equitable accomodation of the right of private citi-

zens to seek redress for the deprivation of their rights and the needs of government officials to act in an uninhibited fashion to carry out the goals of the FmHA. The distorted analysis below affords neither any comfort and represents a massive alteration of the rights of private citizens when confronted with the overwhelming might of government. The decision below so deviates from the constitutional requirements of due process that review by this Court is warranted.

CONCLUSION

For these various reasons and because of the importance of this issue to thousands of Americans with outstanding loans to the Farmers Home Administration, this petition should be granted.

Respectfully submitted,

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December 22, 1987

Terry L. ARCOREN, Appellant,

v.

Wenton PETERS and John Schooler, Appellees.

No. 86-5119.

United States Court of Appeals, Eighth Circuit.

Submitted May 12, 1987.

Decided Sept. 25, 1987.

Before LAY, Chief Judge, HEANEY, ROSS,* McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN and MAGILL, Circuit Judges, En Banc.

JOHN R. GIBSON, Circuit Judge.

Two Farmers Home Administration (FmHA) officials repossessed and sold Terry Arcoren's cattle, in which FmHA held a security interest, without giving him prior

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*The Honorable Donald R. Ross, an active Judge of this court at the time this case was submitted, took senior status on June 13, 1987.

notice or an opportunity to be heard. Arcoren brought a *Bivens*-style action against the two FmHA officials under the fifth amendment, alleging a due process violation. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The central issue in this case is whether it was clearly established in 1980 that the FmHA officials could not, consistent with the fifth amendment, use the self-help remedy permitted under South Dakota's Uniform Commercial Code, S.D. Codified Laws Ann. § 57A-9-503 (1980), in repossessing Arcoren's cattle when they believed he was in default on his FmHA loan. The district court[1] held that Arcoren's constitutional right to notice and a hearing before the cattle were repossessed and sold was not clearly established and therefore dismissed the action against the government officials on the basis of qualified immunity. A panel of this court reversed the district court's dismissal, *Arcoren v. Peters,* 811 F.2d 392 (1987), and we granted a rehearing en banc. We now vacate the panel's decision and affirm the judgment of the district court.

Arcoren received two FmHA loans, one in 1976 and one in 1978, totaling $18,800. He used part of the proceeds to purchase cattle, and he signed a security agreement giving FmHA a security interest in the livestock. In the winter months, Arcoren's cattle were located on either the trust land belonging to his father and his uncle, John Arcoren, Sr., or on land belonging to Richard Hand, his neighbor. In March 1980, Hand and Arcoren's uncle visited the office of Wenton Peters—a County Supervisor

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[1]The Honorable Donald J. Porter, Chief Judge, United States District Court for the District of South Dakota.

for FmHA who had previously been in contact with the plaintiff on other matters concerning his loan—and complained to Peters that they were providing all of the care for Arcoren's cattle and had been doing so for some months. They told Peters that they would turn Arcoren's cattle out onto the road if FmHA did not take some action. About a week later they visited Peters' office again, and told him that they had placed the cattle in a corral for FmHA to repossess. That day, Peters contacted his supervisor, John Schooler, an FmHA District Director, and Schooler agreed that FmHA should repossess and sell Arcoren's cattle.[2] They did not make any attempt to verify with Arcoren the allegations made by Hand and John Arcoren, Sr. They repossessed Arcoren's cattle on March 27, 1980, and the cattle were sold on March 28. Arcoren first learned of the repossession and sale of the cattle on April 1, when he received from the Winner Livestock Auction Company a copy of a bill of sale for twenty head of cattle.

Arcoren then brought this *Bivens* action and the district court dismissed for failure to state a claim, concluding that the availability of the FmHA appeals process

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[2]Under FmHA regulations, a borrower is in default when he has "not cared properly" for the security. 7 C.F.R. § 1962.4(g)(3) (1980). Also, under the terms of the security agreement, Arcoren was in default if he failed to "observe or perform any covenants or agreements [in the security agreement]," one of which was to "care for and maintain the collateral in a good and husbandlike manner * * * [and] not abandon the collateral * * *." Designated Record at 17-18. The agreement provides that, upon default, the secured party "at its option, with or without notice as permitted by law, may * * * enter upon the premises and take possession of [the collateral and] exercise any sale or other rights accorded by law." D.R. at 18.

supplanted any constitutionally based remedy. On appeal, we held that the administrative appeals process does not defeat an action brought directly under the fifth amendment. *Arcoren v. Farmers Home Admin.*, 770 F.2d 137 (8th Cir. 1985). We reversed and remanded for further consideration of whether Arcoren could establish a *Bivens* action. *Id.* at 141. On remand, the district court concluded that the claims were barred by qualified immunity and dismissed the action. *Arcoren v. Peters*, 627 F. Supp. 1513 (D.S.D. 1986). The only issue before us on this appeal is the propriety of the ruling on qualified immunity.

I.

Qualified immunity accommodates competing social interests by ensuring that "plainly incompetent" officials or officials who "knowingly violate the law" are held accountable, while officials who reasonably exercise their discretion may do so without fear of being sued. *See Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14, 102 S.Ct. 2727, 2735-36, 736 L.Ed. 396 (1982). When performing a discretionary function, a government official is entitled to qualified immunity from suit, if, at the time of his conduct, it was not "clearly established" that his actions would violate the plaintiff's constitutional or statutory rights. *Harlow*, 457 U.S. at 818-19, 102 S.Ct. at 2738-39. As the district court aptly noted, determining what constitutes clearly established law is no simple task. *See Arcoren*, 627 F.Supp. at 1515-16.

The qualified immunity defense fails when the official acts in a manner that disregards undisputed constitutional guarantees. *See Wood v. Strickland*, 420 U.S. 308, 321-22, 95 S.Ct. 992, 1000-01, 43 L.Ed.2d 214 (1975). For this

reason, we have held that public officials must "apply well-developed legal principles in carrying out their duties." *Lappe v. Loeffelholz,* 815 F.2d 1173, 1177 (8th Cir. 1987). An official is not expected to anticipate the law's development or its possible application to a unique situation. *See Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738; *Wood,* 420 U.S. at 319-20, 95 S.Ct. at 999-1000; *Lappe,* 815 F.2d at 1176. Such a requirement would " 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Harlow* at 814, 102 S.Ct. at 2736 (quoting *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950)). Moreover, the official could not have "known" that his conduct would violate the law unless that conduct had been identified as unlawful. *Id.* Thus, an official does not forfeit his immunity because he "gambled and lost on the resolution of [an] open question." *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 2820 (1985).

II.

Whether Arcoren had a clearly established constitutional right to prior notice and a hearing turns in large part on whether *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), is directly applicable to the facts before us. In *Fuentes,* the Court held the prejudgment replevin provisions of Florida and Pennsylvania statutes invalid under the fourteenth amendment because they permitted a deprivation of property without an opportunity for a pre-seizure hearing. The challenged statutes allowed any person who claimed that his goods were being wrongfully detained to obtain a writ of replevin from a court clerk simply by filing a complaint and a

security bond. The issuance of the writ allowed the creditor to invoke state power to effect a prejudgment seizure. The writ directed the state officer to seize the property, and allowed him to use force when necessary.[3] Concluding that due process requires "an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another," *id.* at 80, 92 S.Ct. at 1994, the Court held the Florida and Pennsylvania replevin statutes unconstitutional. *Id.* at 96, 92 S.Ct. at 2002.

Immediately after *Fuentes*, the constitutionality of self-help repossession under U.C.C. § 9-503—as used here by the FmHA—came into question. *See, e.g.*, Brodsky, *Constitutionality of Self-Help Repossession Under the Uniform Commercial Code: The Eighth and Ninth Circuits Speak*, 19 S.D.L. Rev. 295 (1973). Since then, however, the courts have almost uniformly upheld statutes allowing a creditor to proceed by self-help.[4] In *Bichel Optical Laboratories, Inc. v. Marquette National Bank of Minneapolis*, 487 F.2d 906 (8th Cir. 1973), this court distinguished the state action involved in the *Fuentes* replevin procedure from the U.C.C.'s self-help remedy, which "involve[s] only private action arising out of the express written agreements between the parties." *Id.* at 907; *see also Adams v. Southern Cal. First Nat'l Bank*, 492

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[3]The Florida replevin statute provided that if the goods were inside some enclosure and were not delivered upon demand, the officer "shall cause such house, building or enclosure to be broken open * * *." Fla. Stat. Ann. § 78.10 (Supp. 1972-73).

[4]See Burke, *More Decisions on the Constitutionality of Self-Help Repossessions*, 27 Pers. Fin. L. Q. Rep. 115, 116 (1973) (collecting cases).

F.2d 324 (9th Cir. 1973), *cert. denied,* 419 U.S. 1006, 95 S. Ct. 325, 42 L.Ed.2d 282 (1974). Thus, if a private creditor had financed Arcoren's loan, the creditor would have been entitled under S.D. Codified Laws Ann. § 57A-9-503, to take possession of the property without notice or a hearing in the event of default, and Arcoren would have no claim that his constitutional rights were violated.[5] Arcoren asserts, however, that because the FmHA is a governmental agency, it could not rely on the self-help provisions of the U.C.C. He argues that the FmHA had additional responsibilities under the fifth amendment and could not operate in the same manner as a commercial lender. We reject this argument. We do not believe that the cases clearly establish this proposition even as of today, much less as of 1980.

In 1980, when the repossession occurred, there was strong authority to support the FmHA officials' position that when the FmHA acted as a lender, it acted in a commercial rather than a sovereign capacity. In *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L. Ed.2d 711 (1979), a case involving the relative priorities of private liens and government liens stemming from federal lending programs, the Court held that government security interests are controlled by the commercial law of each state. The Court stated that the FmHA does not require the special priority of a sovereign power as it does, for example, in the case of a tax lien because the "[g]overnment * * * is in substantially the same position as private lenders." *Id.* at 737, 99 S.Ct. at 1463. It endorsed

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[5]We recognize that if the secured creditor is wrong in his determination of default, the debtor may have a tort claim, but that is not the issue before us.

the court of appeals' view that the FmHA acted as a "quasi-commercial lender," *id.*, and noted that:

> [t]he agencies evaluate the risks associated with each loan, examine the interests of other creditors, choose the security believed necessary to assure repayment, and set the terms of every agreement. By carefully selecting loan recipients and tailoring each transaction with state law in mind, the agencies are fully capable of establishing terms that will secure repayment.

Id. at 736, 99 S.Ct. at 1462-63 (footnotes omitted).

This is not to say that when the government engages in a traditionally private function there is no federal government action and fifth amendment due process restrictions do not apply. The Supreme Court, however, has consistently recognized that the process that is "due" depends on the precise nature of the government function involved and the private interest that has been affected. *See Mathews v. Eldridge,* 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976); *Cafeteria & Restaurant Workers, Local 473 v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748-49, 6 L.Ed.2d 1230 (1961). Unlike the situation in *Fuentes,* the FmHA was not operating pursuant to its authority as a sovereign power, but pursuant to a security agreement that permitted the FmHA to repossess and sell the cattle "with or without notice as permitted by law" if Arcoren was in default. D.R. at 18.

Similar circumstances have been examined in the context of non-judicial mortgage foreclosures by the Government National Mortgage Association (GNMA) and the Federal National Mortgage Association (FNMA). *See Warren v. Government Nat'l Mortgage Assoc.,* 611 F.2d 1229 (8th Cir.), *cert. denied,* 449 U.S. 847, 101 S.Ct. 133, 66

L.Ed.2d 57 (1980); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977); *Northrip v. Federal Nat'l Mortgage Assoc.*, 527 F.2d 23 (6th Cir. 1975). In these cases, the courts rejected similar fifth amendment due process claims. Although the holdings were based on the ground that there was no federal government action, there were strong indications that the courts relied heavily upon the fact that FNMA and GNMA foreclosures were initiated pursuant to a contractual agreement between the parties.

In *Warren*, the plaintiff asserted that GNMA's failure to afford her notice and a hearing prior to the foreclosure sale violated her fifth amendment due process rights. This court recognized that GNMA "is not only wholly-owned by the federal government, but it also operates under federal government authority." 611 F.2d at 1233. Despite this seemingly indisputable entanglement with the federal government, we concluded that "mortgage foreclosures through power of sale agreements * * * are not in and of themselves powers of a government nature." *Id.* at 1234. The court also quoted approvingly from the district court:

> A wholly-owned government agency can enforce a valid *contractual* provision for foreclosure without running afoul of the constraints of the Fifth Amendment, under all circumstances in which the foreclosure of the same contract by a private lender would be held not to violate the requirements of due process.

Id. (quoting *Warren v. GNMA*, Civil Action No. 19006-2, slip op. at 6 (W.D. Mo. Feb. 12, 1979)).

In *Northrip*, the Sixth Circuit also concluded that no federal government action exists when FNMA forecloses

on a mortgage because foreclosure through a power of sale agreement is a contractual remedy, and FNMA is not exercising powers traditionally associated with sovereignty. 527 F.2d at 32. The court noted that the foreclosure is analogous to self-help repossession under U.C.C. section 9-503, which is an "age-old creditor remedy." *Id.* at 33. The court stated that it was no more significant that FNMA foreclosed the mortgage than it would have been if a private creditor had done so. *Id.* Moreover, even though the court did not reach the issue of what process would be due if there were federal government action, it did note that there would be little reason to require a pre-foreclosure hearing because as a practical matter a mortgagee would have no reason to institute foreclosure proceedings unless the mortgagor had defaulted. *Id.*

The panel opinion looked to section 122 of the Agricultural Credit Act of 1978, 7 U.S.C. § 1981a (1982), as clearly establishing that Arcoren had a constitutional right to notice and a hearing. It viewed *Allison v. Block,* 723 F.2d 631 (8th Cir. 1983), as, not an innovation, but a logical interpretation of the Act based on its language and legislative history. We believe that section 1981a and *Allison* do not apply to the circumstances of this case.

Section 1981a permits the Secretary of Agriculture to defer the principal and interest on outstanding FmHA loans and to forego foreclosure if the borrower shows that, due to circumstances beyond his control, he is unable to make the required payments without unduly impairing his standard of living. In *Allison,* this court interpreted section 1981a as imposing a duty on the Secretary to give notice to borrowers of the availability of this relief and

establish uniform procedures that allow borrowers to demonstrate their eligibility for deferral. The court based its decision entirely on statutory grounds, and "declined to meet the constitutional issues' raised by the Allisons. 723 F.2d at 633 n.1. In conclusion, the court stated that "Congress * * * clearly expressed its intent to assist farmers blown astray by [the changing winds of time, nature, fate, and the economy] by granting those who could show that their inability to meet their financial obligations was temporary more time to repay their debts to the government." *Allison*, 723 F.2d at 638.

Despite the fact that the decision in *Allison* was based on a specific statutory right to notice of the availability of section 1981a relief, the panel in *Arcoren* held that the Agricultural Credit Act clearly established a "constitutional right of protection for farmers' property by facilitating whenever practicable the continued operation of existing agricultural enterprises." 811 F.2d at 399. We do not read the Act so broadly. Moreover, FmHA officials could not be on notice in 1980 that section 1981a, which protects farmers with financial difficulties in bad times, would be extended by a court to encompass default in a case such as this where financial difficulty was not an issue. We do not believe that *Allison*—decided in 1983—makes this extension, and it certainly does not indicate that Arcoren had a clearly established constitutional right in 1980.[6]

We need not determine whether Arcoren's fifth amendment rights were actually violated. In deciding a question

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[6]At oral argument, Arcoren's counsel stated that Arcoren was current in his payments and that section 1981a did not apply.

of qualified immunity, as we have discussed earlier, we look to whether established law informed the defendants that their conduct violated "basic, unquestioned constitutional rights." *See Wood,* 420 U.S. at 322, 95 S.Ct. at 1001. Arcoren has not demonstrated, nor has our study caused us to conclude, that there is a constitutional right to prior notice and a hearing when the government acts in the capacity of a commercial lender pursuant to a security agreement. Actually, based on cases such as *Warren* and *Northrip, supra,* it would be easier for us to hold that in 1980 the law was clearly established that the FmHA officials could act as they did. We need not go that far, however; in a qualified immunity case we need only determine that there was a "legitimate question" as to what process was due Arcoren in these circumstances. *See Mitchell,* 105 S. Ct. at 2820 n.12. Thus, we conclude that the defendants did not violate clearly established law in using the secured creditor's self-help remedy under S.D. Codified Laws Ann. § 57A-9-503.

III.

Arcoren further asserts that the defendants violated the clear provisions of the security agreement, FmHA regulations and South Dakota's U.C.C. A *Bivens* action for damages, however, must be founded upon a violation of constitutional rights. *Bivens,* 403 U.S. at 396, 91 S.Ct. at 2004-05; *McIntosh v. Weinberger,* 810 F.2d 1411, 1432-33 (8th Cir. 1987). A violation of a statute or a regulation does not rise to a constitutional level unless the statutory or regulatory provisions supply the basis for the claim of a constitutional right. *Davis v. Scherer,* 468 U.S. 183, 193-94 & n.12, 104 S.Ct. 3012, 3019, n.12, 82 L.Ed.2d 139 (1984);

Culbreath v. Block, 799 F.2d 1248, 1250 (8th Cir. 1986). State law, for example, creates the property and liberty interests that are protected by the fifth amendment, and thus may bear upon a plaintiff's claim that he was deprived of such property or liberty without due process. *See Davis,* 468 U.S. at 193 n.11, 104 S.Ct. at 3018 n.11; *McIntosh,* 810 F.2d at 1432. Here, however, the question concerns not whether Arcoren has an established property interest, but what process is due him before repossession and sale of that property by the FmHA acting as a secured creditor. Arcoren does not argue that our analysis of what process is due turns on the South Dakota statutes or the FmHA regulations. Instead, he asserts that we need not reach the due process issue because the FmHA officials acted beyond their authority as established in the regulations, statute, and security agreement. Appellant's Brief at 11. However, "[w]here neither the constitutional right nor the constitutional cause of action is expressly created by the terms of a regulation or statute, officials do not forfeit qualified immunity solely by failing to comply with the provisions of that statute or regulation." *Culbreath,* 799 F.2d at 1250 (citations omitted).

Even if we were to assume, however, that the procedures outlined in the statutes, regulations, and security agreement bore upon the question of what process was due, there is no provision that clearly establishes the right to notice and a hearing *before* FmHA officials could determine that Arcoren was in default. S.D. Codified Laws Ann. § 57A-9-503 states in part:

> Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed with-

> out judicial process if this can be done without breach of the peace * * *.

Also, under S.D. Codified Laws Ann. § 57A-9-504, a secured party after default may sell the secured property without notice to the debtor if certain conditions exist.[7] The regulations and security agreement define default as including improper care or abandonment of the security.[8] Arcoren apparently interprets the phrases "on default" and "after default" in the statute as requiring FmHA to provide prior notice and a hearing in order to establish default. Nothing in the statutes, however, requires FmHA officials to establish default based on notice and a hearing. In Arcoren's affidavit and in the stipulated facts, Arcoren admits that during the winter his cattle were located on either the trust land belonging to his father and his uncle or on Richard Hand's land. D.R. at 53, 55. He also admits that his uncle and Richard Hand visited Peters' office and told him that they, not Arcoren, had been caring for the cattle and that they would turn the cattle out onto the road if FmHA did not take action. There is nothing in the statutes, regula-

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[7]One exception to the notice requirement is when the collateral was "of a type customarily sold on a recognized market." S.D. Codified Laws Ann. § 57A-9-504(3). The district court held that none of the cases Arcoren cited clearly established as of March, 1980 that cattle were *not* sold on a recognized market. The district court has since been proved correct in its determination. In *First National Bank of Minneapolis v. Kehn Ranch, Inc.*, 394 N.W.2d 709 (S.D. 1986), the South Dakota Supreme Court declined to follow the cases cited by Arcoren and held that commercial cattle raised for sale at public livestock markets are " 'collateral of a type customarily sold on a recognized market' for purposes of S.D. Codified Laws Ann. 57A-9-504(3)." *Id.* at 715 (footnote omitted).

[8]*See supra* n.2.

tions, or security agreement that clearly establishes that FmHA officials could not exercise their discretion to determine that Arcoren was in default under the security agreement based on this information. Thus, the provisions cited by Arcoren do not bear upon the constitutional analysis concerning what process was due.

Accordingly, we affirm the judgment of the district court.

LAY, Chief Judge, dissenting.

I join in Judge Heaney's excellent dissent. I write separately only to emphasize that the weakness and general inconsistency of the majority opinion is reflected in the fact that the government does not even argue, brief, or contend that the FmHA officials were not acting in their sovereign capacity.[1] This is demonstrably illustrated by the government's claim in the district court that as officials of FmHA they enjoy absolute governmental immunity under *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Although the claim of absolute immunity is not raised on appeal, the government does assert that the officials were acting in their sovereign capacity and as such enjoy good faith immunity under *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). The majority so holds. But this analysis is totally inconsistent with the reasoning that the FmHA officials

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[1]The United States in its brief asserts (1) the FmHA officials are entitled to the defense of qualified immunity as *government* officers; (2) as *government* officials they were exercising their discretionary authority; (3) the notice requirement had been waived by the plaintiff in the security agreement; and (4) that the *government* officials did not violate any "clearly established" right at the time of the violation.

were not carrying out the duties of a sovereign power. There should be little question that these officials have denied the plaintiff's property rights without due process of law.

HEANEY, Circuit Judge, dissenting.

In my view, Judge Edward Dumbauld's opinion for the panel correctly stated the law and should be accepted by the Court en banc. *Arcoren v. Peters,* 811 F.2d 392 (8th Cir. 1987). Accordingly, I dissent from the en banc opinion and do so for the reasons so ably set forth by Judge Dumbauld in his opinion of February 2, 1987.

I write only to emphasize several points in the panel opinion which are largely ignored by the majority:

(1) The plain language of the fifth amendment to the United States Constitution states, "No person shall * * * be deprived of * * * property, without due process of law." There is no question that, at the time Arcoren's cattle were taken by the FmHA officials, he had a property interest in the cattle protected by the fifth amendment. *See, e.g., Fuentes v. Shevin,* 407 U.S. 67, 85, 92 S.Ct. 1983, 1996-97, 32 L.Ed.2d 556 (1972) (possessory interest in chattels protected by fourteenth amendment due process); *Rau v. Cavenaugh,* 500 F. Supp. 204, 206 (D. S.D. 1980) (Bogue, J.) (finding "plaintiff's interest in her FmHA financed home is a property interest protected by the fifth amendment"); *see also Johnson v. Department of Agriculture,* 734 F.2d 774, 782 (11th Cir. 1984) ("An FmHA loan, once made, creates a statutory entitlement and a property interest protected by the due process clause of the Fifth Amendment.") (citing *Goldberg v. Kelly,* 397 U.S. 254, 262, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970);

United States v. Henderson, 707 F.2d 853, 857 (5th Cir. 1983); *McCachren v. Department of Agriculture,* 599 F.2d 655, 656 (5th Cir. 1979); *Neighbors v. Block,* 564 F. Supp. 1075 (E.D. Ark. 1983); *United States v. Ford,* 551 F. Supp. 1101 (N.D. Miss. 1982); *Rau v. Cavenaugh,* 500 F. Supp. 204 (D. S.D. 1980); *United States v. White,* 429 F. Supp. 1245 (N.D. Miss. 1977); *Ricker v. United States,* 417 F. Supp. 133 (D. Me. 1976); *Law v. Department of Agriculture,* 366 F. Supp. 1233 (N.D. Ga. 1973)).

(2) It had been long established at the time the FmHA officials took Arcoren's cattle that, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." *Mullane v. Central Hanover Bank,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 685 (1970); *see also Rau v. Cavenaugh,* 500 F. Supp. at 206 ("In this case the due process requirements of adequate notice and the opportunity to be heard are required by the fifth amendment.").

Fuentes v. Shevin, decided by the Supreme Court in 1972, states:

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 102 S.Ct. 1983, 32 L.Ed.2d 556, 569-70 (1972) (citations omitted).

It is difficult to understand how we can ignore this very specific language and hold that the law with respect to notice and hearing was not clearly established when Terry Arcoren's property was seized and sold without notice to him.

(4) The text of the United States Constitution could not be clearer that officials acting on behalf of the United States Government may proceed against an individual as permitted by state statute only if the proceeding is permissible under the United States Constitution. *See* United States Constitution, Article VI ("This Constitution * * * shall be the supreme law of the Land"). Self-help statutes for creditors enjoy no exemption from the Supremacy Clause. *Cf. Mennonite Board of Missions v. Adams,* 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) (holding that due process requires notice by mail to mortgagee of property prior to foreclosure of a tax lien despite state statute that did not require such notice). Requirements imposed upon federal officials by the United States Constitution do not fall by the wayside merely because they are acting pursuant to a state statute of which private creditors may make use.

The majority recognizes that government officials, such as those acting on behalf of the FmHA, must comply with constitutional requirements whether they are performing a traditionally private function or acting pursuant to an agreement with a private individual. Yet, astonishingly, the majority would exempt the FmHA officials from requirements imposed by the Constitution because the action "was not * * * pursuant to [the FmHA's] authority as a sovereign power, but pursuant to a security agreement." Majority opinion at 675. The majority cites

no authority for the novel proposition that government officials acting pursuant to private agreements are exempt from constitutional requirements. The cases cited by the majority are inapposite. *Warren v. Government Nat'l Mortgage Assoc.*, 611 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 847, 101 S.Ct. 133, 66 L.Ed.2d 57 (1980), *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977), *Northrip v. Federal Nat'l Mortgage Assoc.*, 527 F.2d 23 (6th Cir. 1975), and *Bichel Optical Laboratories, Inc. v. Marquette Nat'l Bank of Minneapolis*, 487 F.2d 906 (8th Cir. 1973), deal with the issue whether the government is sufficiently involved in a foreclosure, either because it authorized and played a part in it pursuant to a state statute or because of the quasi-governmental status of the creditor, to invoke due process protections.[1] Certainly in determining whether a foreclosure involves state action it is relevant to consider whether the particular action was taken pursuant to a private agreement, such as a security agreement, or whether the action involved exercise of a power of a govern-

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[1]The district court, in its opinion, recognized that the constitutionality of U.C.C. § 9-503 turns upon whether use of the statute by a *private creditor* involved sufficient state action to invoke constitutional protections. It states:

> Although the self-help provisions of the U.C.C. have been declared unconstitutional in at least two cases, *Watson v. Branch County Bank*, 380 F. Supp. 945 (W.D. Mich. 1974), *rev'd without opin.*, 516 F.2d 902 (6th Cir. 1975); *Boland v. Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973, those were "exceptional cases." A greater number of decisions have held *that repossession under the provisions of the U.C.C. does not entail state action.*

Arcoren v. Peters, 637 F. Supp. 1513, 1517 n.6 (D. S.D. 1986) (emphasis added).

mental nature.[2] But such considerations have nothing to do with this case.

The FmHA officials concede that they were government officials acting on behalf of a government agency

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[2]In *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977), the Fifth Circuit gave the reasons why FNMA, the predecessor of GNMA, was not a government agency:

> Although regulated by the federal government in some aspects of its business, FNMA is essentially a privately-owned mortgage banker providing secondary mortgage loans. In 1968, Congress specifically disassociated FNMA from its previous government ownership and transferred it to private ownership. * * * FNMA maintains the capital structure of a privately-owned corporation. HUD's control extends over restricted areas, including approving the minimum amount of FNMA stock to be held by servicing companies, requiring that a reasonable portion of its mortgage purchases be related to the national goal of providing low income housing, and auditing financial records. * * * The secretary of the treasury also has some control over FNMA relating to the issuance of debt securities and borrowing from the Treasury. * * * We stand with the Sixth Circuit position that although the regulating statutes impose certain obligations on FNMA, the federal government and FNMA have not become so interdependent as to make its actions the actions of the federal government.

Id. at 359 (citations omitted).

Moreover, even if *Warren v. Government Nat'l Mortgage Assoc.*, 611 F.2d 1229 (8th Cir.), *cert. denied*, 449 U.S. 847 (1980), had involved state action, there is nothing in the case contrary to Arcoren's position. In *Warren*, notice was given to the property owners, first by letter and then by publication. GNMA did not secure possession of the property until after it brought an action for unlawful detainer in state court and obtained a judgment in that court. In this case, there was no notice, no hearing and no judicial proceeding, and unfortunately, the federal officers who seized and immediately sold the cattle had, at least we must assume for purposes of this appeal, made no independent effort to determine whether there had in fact been a default.

and that the law clearly established as much at the time they took Arcoren's cattle. This is not surprising, since the fact that they were government officials serves as the source of their claim to qualified immunity. It is incongrous to allow the FmHA officials to claim immunity as government officials and at the same time exempt them from constitutional requirements because their acts were sufficiently private in nature.

Indeed, if at the time they made the decision to repossess Arcoren's cattle, the FmHA officials believed the FmHA would have been treated as a private lender, the problems in this case may well have never occurred. While it is true that, section 9-503 of the U.C.C. authorizes self-help for private lenders, the provision is not risk free. This is because the provision only authorizes self-help in the event of a default, as that term is defined in the agreements of the debtor and creditor. Thus, utilization of U.C.C. § 9-503 involves a determination by the creditor whether there has been a default. The determination is not to be made lightly, however, because if the creditor decides incorrectly that a default has occurred and utilizes the self-help provisions of the U.C.C., it will be liable to the debtor for the tort of conversion. The deterrent effect of the conversion action serves to limit a private creditor's use of self-help to those instances in which it is certain a default has occurred and in which it is likely the debtor will destroy or move the security beyond the creditor's reach before it may be repossessed by judicial process. In this light, and given the facts of this case, it would have been a reckless lawyer who would have advised the FmHA officials to repossess Arcoren's cattle according to U.C.C. § 9-503 on the basis of the hearsay information

available to them, if they faced the same liability as a private lender.[3]

Of course, the FmHA is *not* a private lender and does not claim to have been in 1980. In fact, the FmHA officials in this case not only claim qualified immunity, they also argued for absolute immunity in the district court, based on *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed. 2d 128 (1976), claiming their actions involved discretionary governmental functions of an official nature. Nonetheless, the majority ignores the arguments of the parties and affords the FmHA officials a chameleon-like quality, finding their actions sufficiently governmental to merit qualified immunity and sufficiently private to be exempt from constitutional requirements.

In essence, the majority's decision creates a new "hybrid" type of lender. This hybrid enjoys the privileges of both private and governmental lenders, while being exempt from the responsibilities of both. Thus, the "hybrid" make take advantage of the self-help provisions of the U.C.C. without regard to the fifth amendment, while likely enjoying absolute immunity for itself and its agents act-

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[3]In addition, there are criminal penalties in force for knowingly converting, concealing, removing, or disposing of any property mortgaged or pledged to the FmHA, under 18 U.S.C. § 658. It has been recognized that the availability of the criminal statute makes the self-help provisions of the U.C.C. less necessary for the FmHA to protect security interests in transportable or destructible chattel. *See, e.g., Coleman v. Block,* 580 F. Supp. 194, 204 (D. N.D. 1984).

ing in an official capacity and qualified immunity for its agents in their individual capacities from any conversion action.[4]

Perhaps, in a perfect world, it would be best to allow all creditors, governmental and nongovernmental, to operate according to the privisions of the Uniform Commercial Code without regard to Constitutional requirements and subject only to the deterrent effect the tort action would provide to those thinking of using self-help. This, however, is not the case. The government and governmental officials enjoy significant immunities whether or not the function they perform is that of a private lender. In my view, if the government and its officials are to be awarded the benefit of these immuinties, they must also accept the fact that they are bound to abide by the requirements of the Constitution.

In sum, governmental officials are not exempt from the requirements of the Constitution because a state statute authorizes a private individual to utilize a course of conduct otherwise off-limits to them. The law has always been clear that the Constitution prohibits officials acting on behalf of the government from depriving an individual

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[4]For a discussion of FmHA immunities, see, e.g., *Hagemeier v. Block*, 806 F.2d 197 (8th Cir. 1986); *Poolman v. Nelson*, 802 F.2d 304 (8th Cir. 1986); *Culbreath v. Block*, 799 F.2d 1248 (8th Cir. 1986); *Hamre v. United States*, 799 F.2d 455 (8th Cir. 1986); *DeJournett v. Block*, 799 F.2d 430 (8th Cir. 1986); *United States v. Perry*, 706 F.2d 278 (8th Cir. 1983); *Johnson v. Busby*, 704 F.2d 419 (8th Cir. 1983).

of property with due process. The majority's opinion fails to recognize this basic fact.[5]

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[5]Although raised by the appellee, the majority's disposition of the case obviates the need for it to consider whether Arcoren waived constitutional due process rights to notice and a hearing. As the Supreme Court has recognized, "the hearing required by due process is subject to waiver." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (citing *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971)). Such a waiver is not, however, easily proved because a court should not "presume acquiescence in the loss of fundamental rights." *D. H. Overmyer*, 405 U.S. at 186.

In *Rau v. Cavenaugh*, 500 F. Supp. at 207, the South Dakota district court found a covenant in an FmHA mortgage providing for waiver of notice prior to foreclosure ineffective as a waiver of the debtor's constitutional rights. In so finding the court stated, "This Court is * * * aware of the heavy burden of proof which rests upon any party that claims that a voluntary, intelligent and knowing waiver of constitutional rights has occurred." *Id.* (citing *Fuentes v. Shevin*, 407 U.S. 67, 94-95, *rehrg. denied*, 409 U.S. 902 (1972); *Gonzales v. County of Hidalgo*, 489 F.2d 1043, 1046 (5th Cir. 1973)).

In support of its waiver argument, the FmHA points to the fine print of the security agreement it drafted. In that fine print the agreement states:

> IV. IT IS FURTHER AGREED THAT:
>
> A. Until default Debtor may retain possession of the collateral.
>
> B. Default shall exist hereunder if Debtor fails to perform or discharge any obligation or to pay promptly any indebtedness hereby secured or to observe or perform any covenants or agreements herein or in any supplementary agreement contained, or if any of Debtor's representations or warranties herein prove false or misleading, or upon the death, bankruptcy, insolvency or incompetency of Debtor or any person so called herein. *Upon any such default:*
>
> 1. Secured party, at its option with or without notice as permitted by law, may (a) declare the unpaid balance on the note and any indebtedness secured hereby imme-

(Continued on following page)

(5) With regard to the time at which Arcoren was entitled to notice and an opportunity to respond, the ma-

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(Continued from previous page)

diately due and payable, (b) enter upon the premises and take possession of, cultivate and harvest crops, repair, improve, use, and operate the collateral or make equipment unusable, for the purpose of protecting or preserving the collateral or this lien, or preparing or processing the collateral for sale, and (c) exercise any sale or other rights accorded by law.

2. Debtor hereby (a) agrees to assemble the collateral and make it available to Secured Party at such time(s) and place(s) as designated by the Secured Party, and (b) waives all notices, exemptions, compulsory disposition and redemption rights. [Emphasis added.]

According to the plain language of the security agreement, Arcoren has not waived any rights to notice and hearing. The waiver provisions of the security agreement are effective only upon default. Until default, the provisions remained inoperative. This interpretation is reinforced by clause A which states that Arcoren may retain possession of the cattle until default. Yet, at this stage in the proceeding Arcoren has alleged, and we must accept, that he has not defaulted in any manner. Therefore, by the terms of the security agreement, Arcoren did not waive the right to notice and a hearing prior to the taking of his cattle.

In addition, even if the security agreement did contain language of waiver, it would be ineffective. Although the Supreme Court has allowed waiver of notice and a hearing in the context of debtor-creditor relations, it did so only upon a finding that the waiver was supported by valuable additional consideration and was the result of arms length bargaining. *See D. H. Overmyer*, 405 U.S. at 187. In this case, as in most cases in which the FmHA is the lender, the debtor was presented with a "take it or leave it" situation. The FmHA by definition is a lender of last resort. As such, it can dictate the terms of its contracts. Moreover, the waiver clause in this case is located on the back of the security agreement in the fine print. There is no indication that the waiver was bargained for in any meaningful sense, or that it was supported by any additional consideration. Given these facts, it would be inappropriate to grant the FmHA officials summary judgment on the basis that Arcoren waived his right to a notice and a hearing.

jority mistakenly relies on South Dakota's version of U.C.C. § 9-503 to establish that Arcoren had no right to notice and hearing before the FmHA took his cattle. This reliance is misplaced. As shown above, the due process clause of the fifth amendment prohibits the government from utilizing the section. Rather, the law at the time Arcoren's cattle were taken clearly established his right to some form of notice and an opportunity to be heard before they were seized and sold.

The majority correctly recognizes that the process that is due depends on a weighing of "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976).

In applying the first prong of the test, it is clear that Arcoren had a property interest in the cattle protected by the fifth amendment. As to the second part of the test, it is important to recognize that in the present posture of the case, we must assume that Arcoren was current on his obligations under the loan and that he was not in default. Thus, this was not a case, such as a delinquency in payment, in which default was readily ascertainable by reference to an objective event. Determining default required the FmHA officials to collect some information as to Arcoren's care of the cattle. Certainly, one of the best sources of such information, and a logical starting point, was Arcoren

himself. In this light, the FmHA officials' reliance solely on third party information is questionable.

Finally, with respect to the government's interest and function, section 122 of the Agricultural Credit Act of 1978 is evidence of the intent of Congress as to the proper function of the FmHA and the interests it should serve.[6] Thus, Judge Dumbauld held in the panel opinion that section 1981a of 7 U.S.C., as subsequently interpreted by *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983), to require the FmHA to give predeprivation notice of deferral relief and to require uniform procedures for deferral eligibility, should have lead the FmHA offcials to conclude that a predeprivation notice and hearing were required in Arcoren's case. Judge Dumbauld arrived at the conclusion reasoning that if Congress had expressed its intent that those who are clearly in default are entitled to predeprivation notice and hearing, those for whom default was at issue would be entitled to no less, particularly in light of the policy embodied in the statute of "facilitating whenever practicable the continued operation of existing agricultural

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[6]In a footnote to the panel opinion, Judge Dumbauld points out that FmHA officials must heed and adopt policies mandated by the Congress. The opinion states:

> For example, the FmHA is not free to adopt the policy that something must be done to reduce the national deficit, and that therefore all farm loans shall be liquidated and foreclosed and collection thereof accelerated upon the slightest pretext, in order to gather as much money as possible into the government's hands to be applied to reduction of the national debt. On the contrary the FmHA must heed and adhere to the policy mandated by Congress of preserving existing farm operations wherever possible when they are threatened by temporary emergencies.

Arcoren, 811 F.2d at 398 n.14.

enterprises." *Arcoren*, 811 F.2d at 399. Thus, the law at the time Arcoren's cattle were seized and sold, was clearly established with respect to notice and hearing, and its requirements were not overly burdensome or surprising. It merely required the FmHA officials to contact Arcoren and to give him a chance to respond before seizing and selling his cattle.[7] *Cf.* K. Davis, Administrative Law Treatise § 13:2 p.477 (1979 & Supp. 1982) ("A mighty good procedure—far superior to complete absence of procedural protection—is to confront a party with a summary of the evidence against him and to listen for five minutes to what he has to say.")

In sum, it is unconscionable that the FmHA officials involved seized and immediately sold Arcoren's cattle without providing him notice, without providing him an opportunity to respond to accusations by third parties that he had abandoned the cattle, without engaging in any judicial proceeding, and without even making any effort to independently verify whether Arcoren had in fact abandoned his cattle. The alleged behavior, if true, violated Arcoren's clearly established constitutional rights. The panel opinion is sound and should be adhered to.

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[7]The majority's statement, "that there would be little reason to require a pre-forclosure hearing because as a practical matter a mortgagee would have no reason to institute foreclosure proceedings unless the mortgagor had defaulted," majority opinion at 8, fails completely to consider the purpose served by a hearing. The purpose of the hearing is to allow the debtor to correct any misinformation the creditor may have concerning default. Moreover, since foreclosure and sale of collateral is a costly procedure and often fails to yield funds sufficient to fully pay the debt, it will normally be in the creditor's interest to contact the debtor and avoid foreclosure if at all possible.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Terry L. ARCOREN, Appellant,

v.

Wenton PETERS and John Schooler, Appellees.

No. 86-5119SD.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 14, 1986.

Decided Feb. 2, 1987.

Before HEANEY and WOLLMAN, Circuit Judges, and DUMBAULD,* Senior District Judge.

DUMBAULD, *Senior District Judge*:

Ever since *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946) and *Bivens v. Six Unknown Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), it has been settled that, under some circumstances, by virtue of the principle *ubi jus ibi remedium,* a person whose clearly established constitutional rights are violated by federal officials may sue them directly even though no legislation by Congress exists specifically authorizing such a remedy. See 403 U.S. at 396-97, 91 S.Ct. at 2004-05 [Fourth Amendment]; *Davis v. Passman,* 422 U.S. 228, 234-48, 99 S.Ct. 2264, 2271-78, 60 L.Ed.2d 846 (1979) [sex discrimination violating

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*The HONORABLE EDWARD DUMBAULD, United States Senior District Judge for the Western District of Pennsylvania, sitting by designation.

equal protection component of due process clause of Fifth Amendment].

Of course caution must be observed in according the *Bivens* remedy.[1] *Bivens* itself recognizes the possible existence of "special factors counselling hesitation in the absence of affirmative action by Congress" 403 U.S. at 396, 91 S.Ct. at 2005, such as the existence of another "equally effective" remedy 403 U.S. at 397, 91 S.Ct. at 2005.[2] A *Bivens* action must be founded upon disregard of requirements established by the Constitution. Mere *ultra vires* action in excess of the officer's lawful authority does not suffice, 403 U.S. at 396-97, 91 S.Ct. at 2004-05. Nor does a mere tort not of constitutional dimension, nor a mere erroneous decision. *McGovern v. New York,* 229 U.S. 363, 370, 33 S.Ct. 876, 877, 57 L.Ed. 1228 (1913); *Chicago Life Ins. Co. v. Cherry,* 244 U.S. 25, 30, 37 S.Ct. 492, 493, 61 L.Ed. 966 (1917) [Holmes, J.].

In the case at bar appellant seeks *Bivens* relief for deprivation of property, namely cattle, seized and sold (without notice or hearing to appellant) by two officials of the Farmers Home Administration (FmHA) upon being informed by third parties that appellant, contrary to his obligations under the loan agreement, had neglected and abandoned the cattle, in which the FmHA had a security interest.

It should be noted that the proceeds of the sale were credited against appellant's indebtedness to the FmHA and that he was not delinquent in his monetary payments at the time of the seizure and sale; and that he contends that loss of the cattle deprived him of the opportunity to continue in the cattle business as an independent entrepreneur, relegating him to the inferior status of "hired hand."

When this case first came before this Court in *Arcoren v. Farmers Home Administration,* 770 F.2d 137, 139-40 (8th

Cir. 1985), we held that the *Bivens* action was not precluded by the mere existence of FmHA regulations authorizing an administrative appeal. This Court did "not decide that Arcoren had a clearly established due process right to notice and hearing or that Arcoren has proven his case on the merits. This question must be passed on initially by the district court." 770 F.2d at 141.

Upon remand the District Court granted the defendants' motion for summary judgment, thus deciding adversely to appellant the question left open by this Court's prior decision, whether appellant at the time of the seizure and sale had a clearly established constitutional due process right to pre-seizure notice and hearing. *Arcoren v. Peters,* 627 F. Supp. 1513, 1517-19 (D.S.D. 1986). To the correctness of this holding we must now turn our attention. We conclude that appellant's claim has sufficient possible merit that it should not have been foreclosed *in limine* by grant of summary judgment.

Due process is a concept with roots going back to Magna Carta [*Murray's Lessee v. Hoboken Land and Improvement Co.,* 18 How. 272, 276, 15 L.Ed. 372 (1856)], but the *sedes materiae* for our purposes is the language of the Fifth Amendment:

> nor [shall any person be] deprived of life, liberty, or property, without due process of law.

It will be noted that this prohibition of wrongful deprivation is in the passive voice, and is applicable against any wrongdoer. There is no requirement of "State action," as necessitated by the wording of the Fourteenth Amendment.[3] But if, as in the case at bar, the alleged wrongdoers are federal officers, a question arises as to the extent to which they enjoy "official immunity" from liability. The

important public policy in favor of immunity is designed to encourage officers to perform their duties zealously without misgivings regarding the burdens of being subjected to unmeritorious and vexatious litigation. The policy has never been better expressed than by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949)[4]:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

As in the case of protection against double jeopardy, the immunity is not designed to insure the successful outcome of a trial, but to prevent undergoing a trial at all, in a case where immunity is applicable. *Abney v. U.S.,* 431 U.S. 651, 659-62, 97 S.Ct. 2034, 2040-41, 52 L.Ed.2d 651 (1977); *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 2815-16, 86 L.Ed.2d 411 (1985) ["The entitlement is an *immunity from suit* rather than a mere defense to liability"].

In the case of subordinate officers such as appellees, qualified rather than absolute immunity is applicable. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), where it was held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established*

statutory or constitutional rights of which a reasonable person would have known" [Italics supplied].[5]

A later expression of the same rule is found in *Mitchell v. Forsyth,* 472 U.S. 511, 105 S.Ct. 2806, 2814, 86 L.Ed.2d 411 (1985). It was there held that Attorney General Mitchell (who had authorized a telephone tap without a warrant[6] when not acting in a prosecutorial capacity but allegedly in the interest of national security) enjoyed only qualified immunity. It was expressly stated that his mere status as a cabinet officer was insufficient to invest him with absolute immunity (105 S.Ct. at 2814). The Court held that "Under the standard of qualified immunity [he] will be entitled to immunity so long as his actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' "[7] (105 S.Ct. at 2814). Applying that standard the Court decided that in November, 1970, it was by no means clear that such warrantless wiretaps were unconstitutional. (105 S.Ct. at 2818).[8]

The standard requiring that the constitutional right allegedly violated must be a *clearly established* right applies in a *Bivens* type action. *Butz v. Economou,* 438 U.S. 478, 500-501, 98 S.Ct. 2894, 2907, 2908, 57 L.Ed.2d 895 (1978).

Hence we must consider with care whether in 1980, when Arcoren's cattle were seized and sold without notice or hearing, there existed a clearly established due process right entitling him to notice or hearing.

A leading authority on notice in the due process context is *Mullane v. Central Hanover Bank,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950) where the Supreme Court said: "An elementary and fundamental requirement

of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

In *Mullane* the Court emphasized that "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." (339 U.S. at 318, 70 S.Ct. at 659).

Hence while notice by publication in a newspaper is sufficient in the case of beneficiaries of a common trust fund whose whereabouts were unknown, the Court held that where the trustee knew the names and addresses of the beneficiaries "a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses" must be made. (339 U.S. at 318, 70 S.Ct. at 659).

A recent case involving cancellation of a prisoner's "good time credits" (which would prevent a shortening of the period of incarceration), *Superintendent, Massachusetts Correctional Institution v. Hill,* 472 U.S. 445, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985), specified as due process requirements: (1) advance written notice of the charges; (2) an appropriate opportunity to present evidence; and (3) a written statement by the fact-finder of the evidence relied on and the reasons for the decision.

A pre-termination hearing has been held necessary before suspending a relief recipient from receipt of welfare benefits. *Goldberg v. Kelly,* 397 U.S. 254, 264, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287 (1966). The crucial factor here is that termination of benefits pending determination of eligibility might deprive an eligible, needy recipient of

the means of living while he waits.[9] In other situations a subsequent hearing may suffice. The *Goldberg*-type hearing, like that in the good time credit case, requires opportunity to be heard, to confront or cross-examine adverse witnesses, and a statement of reasons by the fact-finder, 397 U.S. at 267-71, 90 S.Ct. at 1020-22.

Failure to afford a pre-deprivation hearing was likewise the vice found in Florida and Pennsylvania replevin statutes in *Fuentes v. Shevin,* 407 U.S. 67, 80-84, 93, 92 S.Ct. 1983, 1994-96, 2000, 32 L.Ed.2d 556 (1972). Under those statutes the possessor of chattels could be deprived of possession on the strength of nothing more than the replevying party's claim of the right to possession, without any exercise of discretion or judgment by an impartial public official.

We recognize of course that the determination of what process is "due" depends on the circumstances of the case, and requires analysis of the precise nature of the governmental and private interests affected. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961); *Mathews v. Eldridge,* 424 U.S. 319, 334-35, 96 S.Ct. 893, 902-03, 47 L.Ed.2d 18 (1976). In our prior *Arcoren* decision we noted that some situations are conceivable where repossession without prior notice might well be within the rights of a secured creditor. 770 F.2d at 140. For example, simple non-payment on a note when due might be an example of a plain, objectively determinable event of default not giving rise to genuine controversies or depending on subjective appraisal of a complicated fact-situation.

In the case at bar, however, it is to be remembered that Arcoren was not delinquent in his money payments.

The alleged breach of covenant related to his duty to care for the cattle in order to preserve their value as security for his obligation to FmHA.[10] Such a duty might well be of controversial character and involve genuine factual disputes. In any event it involved the exercise of discretion and judgment, rather than an automatic and objective determination.

The general principles regarding need for notice and opportunity to respond as requirements of due process are fortified and brought into focus by consideration of the statutory policy and provisions of the farm relief legislation involved in the case at bar. What Congress has enacted is significant evidence of what fundamental fairness demands.[11]

Section 122 of the Agricultural Credit Act of August 4, 1978, 92 Stat. 420, 427-28, under the heading "Loan Moratorium and Policy on Foreclosures" added to existing farm legislation a new section, 7 USC 1891a, reading as follows:

> In addition to any other authority that the Secretary may have to defer principal and interest and forego foreclosure, the Secretary may permit, at the request of the borrower, the deferral of principal and interest on any outstanding loan made, insured, or held by the Secretary under this title, or under the provisions of any other law administered by the Farmers Home Administration, and may forego foreclosure of any such loan, for such period as the Secretary deems necessary upon a showing by the borrower that due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making payments of such principal and interest when due without unduly impairing the standard of living of the borrower. The Secretary may permit

> interest that accrues during the deferral period on any loan deferred under this section to bear no interest during or after such period. *Provided,* That if the security instrument securing such loan is foreclosed such interest as is included in the purchase price at such foreclosure shall become part of the principal and draw interest from the date of foreclosure at the rate prescribed by law.[12]

Analysis of this section indicates that Congress has authorized the Secretary of Agriculture (FmHA) to defer payments of principal and interest and to delay foreclosure for such time as to him seems necessary, if

(1) request is made by the borrower (thus by implication assuming that in some fashion the borrower has become aware of this section)[13]; and

(2) the borrower shows (thus by implication assuming that the borrower has an opportunity to make the showing and that the Secretary must duly hearken unto and give due consideration to such a showing)

   (a) that the borrower is unable to continue making payments of principal and interest without unduly impairing the standard of living of the borrower;

   (b) that such inability is temporary; and

   (c) that such inability is due to circumstances beyond the borrower's control.

It is obvious that these are requirements which call for exercise of discretion and for evaluation of evidence and circumstances by the FmHA. They cannot be satisfied by the automatic ascertainment of an objectively verifiable event of default (such as non-payment of a sum certain at the time and place where it is due and payable).

The need for such discretionary evaluation is indisputable. For example, deferment is to be granted only if the debtor's inability to pay is temporary. That is not the case when "there is no reasonable prospect of ultimate repayment of the loan." Hence "it would seem that an inquiry into the borrower's ultimate ability to repay is necessary, even though the statute does not explicitly" say so. *Curry v. Block,* 738 F.2d 1556, 1563 (11th Cir. 1984). A similar inquiry must ascertain the borrower's capability as a competent farmer. If his incorrigible incompetence or incurable inertia and shiftlessness, rather than weather or other natural disaster or the general state of the farm economy, is responsible for his inability to pay, it is clear that no deferment pursuant to § 1981a is appropriate. Emphatically the determinations to be made require more than automatic application of a simple objectively verifiable criterion which does not require notice and hearing.

In *Allison v. Block,* 723 F.2d 631, 634-35 (8th Cir. 1983), this Court held that the FmHA must notify potential beneficiaries of the existence of § 1981a relief, and also establish procedural and substantive regulations to "implement" the statutory program. The legislative history demonstrates that Congress intended that regulations be adopted similar to those formulated in a preceding farm program relating to housing loans. It was explicitly stated that the Secretary was not free to "deny all deferral requests *ex cathedra*" and nullify the policy proclaimed by Congress (723 F.2d at 637).[14]

Both of these aspects of our *Allison* decision were followed by the Eleventh Circuit in *Coleman v. Block,* 738 F.2d 1556, 1560-61 (11th Cir. 1984). In *Curry* the Court

pointed out that "the government now concedes that § 1981a mandates the FmHA to give borrowers notice of the availability of deferral relief." It also commented that the government's shift in position "demonstrates that it is much easier to argue an extreme position in the peaceful vacuum afforded by an appellate brief than in oral argument before a three-judge panel" (738 F.2d at 1560).

In the case at bar counsel for FmHA contended that not until *Allison* (decided December 28, 1983) did the requirements of notice and hearing arise. Hence it is argued that in 1980, when Arcoren's cattle was sold without notice or hearing, such action was not taken in defiance of a "clearly established" constitutional right.

This argument is not utterly frivolous. However, we are convinced that our decision in *Allison* was not an innovation produced by a process of "cerebral parathenogenesis"[15], but a logical interpretation derived from careful scrutiny of the language and legislative history of the statute.

Under the circumstances of the case at bar, therefore, in evaluating the issue of fundamental fairness, we are inclined to conclude that the total extinction of Arcoren's property rights to his cattle was a deprivation without "due" process when it occurred without notice to him or any opportunity to request, and show if possible his entitlement to, the type of relief in such cases made and provided by the Congress for "farmers of skill, perseverance, and dedication" who are nonetheless vulnerable, like the agricultural industry in general, "to the changing winds of time, nature, fate, and the economy."

For "Congress in 1978 clearly expressed its intent to assist farmers blown astray by these winds by granting

those who could show that their inability to meet their financial obligations was temporary more time to repay their debts to the government'' (723 F.2d at 638). This clearly established right, in furtherance of the constitutional right of protection for farmers' property by facilitating whenever practicable the continued operation of existing agricultural enterprises, was thus antecedent to 1980; and it was the duty of defendants to be aware of the policies and provisions of the legislation governing the exercise of their FmHA functions.[16]

The case at bar thus seems to fall within the principle of *Fuentes a fortiori* since Arcoren was deprived not only of possession but of all property rights in his cattle. They were sold to a third party. Arcoren was summarily ejected from the cattle business as an independent entrepreneur. To be sure, he may have difficulty proving damages, for the sale price of the cattle was credited against his debt to FmHA. But there was a plain and total deprivation of property, amounting to a common law ''trover and conversion'' unless it was lawfully authorized.

The deprivation was of conventional property rights in his chattels (indeed the term chattels is derived from *catalla,* cattle, as the paradigmatic exemplification of personal property at common law). If prior notice is required for welfare ''entitlements,'' the new-fangled type of property described by Professor Reich[17] (see *Goldberg, supra*), would it not be required *a fortiori* before permitting conversion of a type of personal property *par excellence* long recognized at common law? Is it not the same *a fortiori* argument applicable to such property in cattle if prior notice is required of deprivation of another recently cre-

ated type of protected interest in "good time credits" for prisoners (see *Hill*, supra)? A prisoner would not be treated unjustly if required to serve the entire prison term to which he was duly sentenced; his right to diminution of the time to be served is certainly not a constitutionally protected interest more solid and substantial than a tradiional property right in cattle.

Without necessarily accepting appellant's characterization of FmHA loans as "predominantly a form of social welfare legislation,"[18] and hence governed by *Goldberg*, we think it is indisputable that the specific policies and procedures prescribed by the Congress with regard to such loans must be accepted and complied with by FmHA officials in performing their duties, and must be afforded due weight by the courts in evaluating the propriety of FmHA action and the legal consequences thereof.

We therefore conclude that Arcoren's implied *Bivens* right of action should not be cut off by summary judgment without an opportunity to present his case, although it seems likely that defendants may be able to show as a defense that under the circumstances they accorded him the functional equivalent of notice and hearing by reason of the prior course of dealing between the parties. Apparently, defendants said that if it had been anyone other than Arcoren, they would have called him in to discuss the problem.

This indicates that there may have been prior discussions with Arcoren regarding his delinquencies in caring for the cattle, in the course of which they may have definitely explained to him the consequences of continued disregard of his obligation to care properly for the cattle col-

lateral, and he may have plainly indicated his inability or unwillingness to comply with his contractual obligations, even if further time were granted him for rectifying the default.

In the course of such prior dealings Arcoren may have acknowledged (or defendants validly determined) his incorrigible incompetence as a farmer, or that his non-performance was not temporary or due to factors (such as weather or the depressed state of the farm economy in general) beyond his control.

In view of what may have taken place and been said on both sides of such prior occasions, defendants may have been justified in believing the statements of the third parties who notified them that Arcoren had abandoned the cattle.[19] Furthermore, as indicated above, Arcoren may have difficulty in establishing any actual damages.

Moreover, another factor weighing in defendants' favor when the reasonableness of their action is assessed under the standard of fundamental fairness is the need for quick action. In the case at bar livestock, needing constant care and feeding, were involved. The situation is different from a case involving tractors or other inanimate farm machinery or equipment.

Nevertheless, we are convinced that in view of the allegations showing prima facie deprivation of clearly established constitutionally protected rights of property without any notice or hearing, Arcoren should be permitted to prove his case if he can. Accordingly the judgment of the District Court is reversed and the case remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

WOLLMAN, Circuit Judge, dissenting.

The majority opinion holds that the rights of an FmHA borrower, as enunciated by this court in *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983), were clearly established at the time defendants took possession of Arcoren's cattle in March of 1980. As I see it, such a holding is foreclosed by this court's recent decisions in *Hagemeier v. Block*, 806 F.2d 197 (8th Cir. 1986); and *Cobreath v. Block*, 799 F.2d 1248 (8th Cir. 1986). Accordingly, I respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[1]Caution is appropriate a *fortiori* with respect to implied actions based on the Constitution, since circumspection is the rule with respect to implied actions based upon a statute. *Cort v. Ash*, 422 U.S. 66, 80-84 (1975), lists four pertinent factors for consideration with respect to the propriety of an implied action based upon a statute. See also *J. I. Case Co. v. Borak*, 377 U.S. 426, 433; *Blue Chip Stamps v. Manor Drug Store*, 421 U.S. 723, 730 (1975); and *Kardon v. National Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946) [citing *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916), applying the maxim *ubi jus ibi remedium*]. There is serious danger that undue extension of the remedy will result in wasteful expenditure of judicial effort on unimportant questions of fact such as the sufficiency of evidence to support a search warrant, or whether bail is excessive. See *Carlson v. Green*, 446 U.S. 14, 35-36 (1980) [Rehnquist, now Chief Justice, dissenting]; Frankel, Implied Rights of Action, 67 Va.L.R. 553

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(1981); as well as the detailed and thorough Note, *Howard v. Pierce*: Implied Causes of Action and the Ongoing Vitality of *Cort v. Ash*, 80 Northwestern Univ. L.R. (1986) 721.

[2]To the same effect, see also *Carlson v. Green*, 446 U.S. 14, 18-19 (1980). *Bush v. Lucas*, 462 U.S. 367, 378 (1983), speaks of "paying particular heed . . . to any special factors counselling hesitation before authorizing a new kind of federal litigation."

[3]*U.S. v. Guest*, 383 U.S. 745, 755 (1966); *U.S. v. Pierce*, 355 U.S. 787, 799 (1966).

[4]See also *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); *Nixon v. Fitzgerald*, 457 U.S. 731, 744-47 (1982).

[5]Though appellees claim absolute immunity little time need be devoted to consideration of that contention. It is true that the rationale advanced in *Butz v. Economou*, 438 U.S. 478, 509-510 (1978), for absolute immunity is that the acts of officials in those categories enjoying absolute immunity tend to provoke irrational retaliatory responses from parties involved. It is also true that officers foreclosing farm mortgages, like bill collectors and tax collectors, may often be held in public disteem with "publicans and sinners." Indeed there were threats by farmers to lynch an Iowa judge during the depression if he signed foreclosure decrees. See Dumbauld, *The Constitution of the United States* (1964) 6 n. 15.

Nevertheless, if the Attorney General of the United States (when not acting as prosecutor), cabinet officers, and presidential aides receive only qualified immunity (*Mitchell v. Forsyth*, 105 S.Ct. 2806, 2813 (1985); *Butz v. Economou*, 438 U.S. 478, 507 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)], it would seem that officers as far down the ladder as appellees are clearly not entitled to absolute immunity.

[6]Not until a year later, in *U. S. v. U. S. District Court*, 407 U.S. 297, 320 (1972), was it decided that such wiretaps were unconstitutional.

[7]As Justice Stevens, concurring in the judgment in *Mitchell*, commented: "The availability of qualified immunity is hardly comforting when it took 13 years for the federal courts to determine that the plaintiff's claim in this case was without merit." 105 S.Ct. at 2824.

[8]See note 6, supra.

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[9]The importance of this factor seems to be minimized by the opinion in *Fuentes,* 407 U.S. at 88-90. But cf. *Mathews v. Eldridge,* 424 U.S. 319, 340-44 (1976).

[10]In Paragraph III-B. of the security agreement of May 11, 1977, the debtor covenanted to " . . . (2) comply with such farm and home management plans as may be agreed upon . . . , (3) care for and maintain the collateral in a good and husbandlike manner, . . . (6) not abandon the collateral or encumber, conceal, revoke, sell or otherwise dispose of it . . . or permit others to do so, without the prior written consent of Secured Party, and (7) not to permit the collateral to be . . . injured or destroyed, or its value to be impaired, except by using harvested crops in amounts necessary to care for livestock covered thereby." Only in the event of established violation of these covenants was the seizure and sale of Arcoren's cattle lawful. His money payments were current, up until January 1, 1981.

[11]Just as widely accepted treaty obligations often reflect the requirements of customary international law. See, e.g., International Court of Justice Reports 1986, p. 4, § 183, reported in International Legal Materials, Vol. 25, No. 5 (Sept. 1986), p. 1065.

[12]Section 126 of the Act [92 Stat. 429] specifies that "a high priority is placed on keeping existing farm operations operating." 7 USC 1921, note.

[13]Thomas Jefferson boasted of American farmers to European friends that "ours are the only farmers who can read Homer." To St. John de Crevecoeur, Paris, Jan. 15, 1787, 11 Boyd, *Papers of Thomas Jefferson* (1955) 44. This may be thought, today at least, to be exaggeration or hyperbole. Equally unrealistic is the expectation that the ordinary farmer "spend his extra hours in a federal depositary, probably at least one 100 miles from his farm, reading the United States Code and Federal Register." *Coleman v. Block,* 562 F. Supp. 1353, 1361 (D.N.D.S.W. Div. 1983).

[14]For example, the FmHA is not free to adopt the policy that something must be done to reduce the national deficit, and that therefore all farm loans shall be liquidated and foreclosed and collection thereof accelerated upon the slightest pretext, in order to gather as much money as possible into the government's hands to be applied to reduction of the national debt.

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On the contrary the FmHA must heed and adhere to the policy mandated by Congress of preserving existing farm operations wherever possible when they are threatened by temporary emergencies.

[15]*Lovelace v. Leechburg Area School Dist.*, 310 F. Supp. 579, 585 (W.D. Pa. 1970).

[16]Indeed, Section 126 of the Act (92 Stat. 429) declares that in carrying out the provisions of farm legislation the Secretary should ensure that "only officers and employees . . who are adequately prepared to understand the particular needs and problems of farmers in an area are assigned to such area."

[17]Charles A. Reich, "The New Property," 73 Yale L.J. 733 (April, 1964).

[18]627 F. Supp. at 1518. See also *Coleman, supra*, 562 F. Supp. at 1364-65; and *U. S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 735 (1979).

[19]The persons upon whose statements appellees relied were Richard Hand and appellant's uncle John Arcoren. Appellant's affidavit shows that he had made arrangements to use Hand's land, as well as land in which John Arcoren had an interest, to pasture the cattle. Appellees, by reason of familiarity with the pasturizing arrangements may well have had reason to believe the statements on March 17, 1980 and March 25, 1980 by Hand and John Arcoren that they were taking care of the cattle and appellant was not, and that they "have had it" and will turn the cattle loose; and that they had placed the cattle "in a corral for FmHA to pick up." Appellees might even have had reason to believe that Hand and John Arcoren were authorized to act on behalf of appellant in making these statements.

Terry L. ARCOREN, Plaintiff,

v.

Wenton PETERS and John Schooler, Defendants.

Civ. No. 83-3017.

United States District Court, D. South Dakota, C.D.

Feb. 13, 1986.

MEMORANDUM OPINION

DONALD J. PORTER, Chief Judge.

This is an action for an alleged violation of plaintiff's Fifth Amendment right to due process brought directly under the United States Constitution. See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Named as defendants are John Schooler, District Director for the FmHA, and Wenton Peters, a supervisor for the FmHA.[1] Plaintiff seeks damages for the allegedly unlawful repossession and sale of his cattle, pursuant to a security agreement with the FmHA, without prior notice and an opportunity to be heard.

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1. All of the original defendants except Schooler and Peters, sued as individuals, were dismissed from the case on August 6, 1984.

JURISDICTION

Jurisdiction is predicated upon 28 U.S.C. § 1331 and 5 U.S.C. § 702.

FACTS

Plaintiff Arcoren received approximately $19,000 in FmHA loans during a period beginning in 1978. Arcoren used part of the loan proceeds to purchase cattle, which were subject to a FmHA security agreement. In late March, 1980, a local FmHA office was notified by third parties that Arcoren had abandoned his cattle.[2] Without notifying plaintiff, Peters, after consulting with Schooler, repossessed plaintiff's cattle and sold them.

Arcoren did not learn of the repossession and sale until April 1, 1980, when he received a bill of sale from the Winner Livestock Auction Company. FmHA applied the sum realized from the sale of plaintiff's cattle, $9,068.34, to his FmHA account. Subsequently, plaintiff received a notice of acceleration from FmHA.

PROCEDURAL HISTORY

Upon learning of FmHA's actions and his right to appeal, Arcoren pursued an administrative appeal through

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2. FmHA regulations define default, in part, as "[w]hen a borrower . . . [c]eases to conduct farming or other operations for which the loan was made [or] has not cared properly for [the security] . . . ." 7 CFR § 1962.4(g)(2) & (3) (1980).

Plaintiff claims he had not abandoned his cattle. Whether he was actually in default, however, is immaterial. Plaintiff seeks relief for deprivation of his property *without prior notice and a hearing*. It is undisputed that no such notice and hearing were provided.

three of four possible levels. Unsuccessful in his agency appeals, Arcoren filed this *Bivens*-styled action in district court.

This court initially dismissed the case for failure to state a claim. *Arcoren v. Schooler*, Civ. 83-3017, (D.S.D. Nov. 2, 1984). This court held that the post-seizure appeals process was adequate to protect Arcoren's due process rights. *Id.* at 4. In addition, this court found that the availability of a "comprehensive administrative appeal process", *id.* at 5, was a "special factor[] counselling hesitation before authorizing a new kind of federal litigation." *Id.*, quoting *Bush v. Lucas*, 462 U.S. 367, 377, 103 S.Ct. 2404, 2411, 76 L.Ed.2d 648 (1983) (citations omitted).

The Eighth Circuit Court of Appeals reversed the dismissal, holding that "the FmHA administrative appeals process set forth in 7 CFR § 1900.53 (1980), under the unique circumstances of this case, does not defeat an action brought directly under the fifth amendment to the United States constitution." *Arcoren v. Farmers Home Administration*, 770 F.2d 137, 141 (8th Cir. 1985). The case was remanded for further proceedings, and now is before this court for decision of the defendant's motion for summary judgment on the issue of absolute and qualified immunity of the individual defendants.

DISCUSSION

Absolute Immunity.

Defendants first assert absolute immunity under *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). Although the court doubts the applicability of

Imbler to this case, see *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), it is not necessary to decide that question, because the court's holding on the issue of qualified immunity will be dispositive.

Qualified Immunity.

Prior to 1982, the leading case on qualified immunity was *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975). *Wood* created a two-part test to determine the availability of qualified immunity. Qualified immunity was not an available defense if the government official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [person]." *Wood,* 420 U.S. at 322, 95 S.Ct. at 1001.

The purpose of qualified immunity is to allow the orderly processes of government to continue, while still protecting, to the fullest extent possible, the constitutional rights of individual citizens. With a qualified immunity defense available, "public [officials] understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." *Id.* at 321, 95 S.Ct. at 1000.

Recognizing that the *Wood* test was not serving its intended purpose of disposing of "insubstantial lawsuits" on motion for summary judgment, the Court revised the *Wood* test by eliminating the subjective element. *Harlow*

v. Fitzgerald, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982) (citations omitted). Applying the new test, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738. Even if the right violated is shown to have been "clearly established" at the time of the official's alleged wrongdoing, if he "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained." *Id.* at 819, 102 S.Ct. at 2738. The qualified immunity defense applies equally to *Bivens*-styled constitutional tort actions and cases brought pursuant to 42 U.S.C. § 1983. *Butz*, 438 U.S. at 500-01, 98 S.Ct. at 2907-08.

Clearly Established Rights.

The Court has never plainly defined the term "clearly established." See *Wood*, 420 U.S. at 329, 95 S.Ct. at 1004 (Powell, J., concurring in part and dissenting in part). As the Court of Appeals for the District of Columbia Circuit has observed:

> Our task, in applying *Harlow*, is to measure the constitutionality of the acts alleged in this action by reference to clearly established rights at the time the acts occurred. At first blush, the task as so stated appears simple and straightforward. A moment of reflection, however, reveals various uncertainties in the *Harlow* decision and exposes a test of some imprecision. It is not clear, for example, how a court should determine well-established rights: Should our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts,

> or all of the foregoing? Furthermore, it is unclear whether we must assure ourselves only of the existence of a constitutional right such as the constitutional right of freedom of speech, or religion, at the relevant time. Alternatively, it might be claimed that a court must inquire more deeply into the constitutionality of the particular conduct of the Government actor, such as the legality of domestic national security warrantless wiretaps, at a given time. Put another way, how broadly or narrowly defined is the right that must be well-established?
>
> At the extremes, the answers are clear. Supreme Court precedent "establishes" the law; to the extent that the Court's opinions give guidance we obviously do not doubt that the law is well-established. It is equally clear that the right at issue can be defined neither so broadly as to parrot the language in the Bill of Rights, nor so narrowly as to require that there be no distinguishing facts between the instant case and existing precedent. The former reading of *Harlow* would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that their conduct is problematic. The latter reading, on the other hand, would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation.

Hobson v. Wilson, 737 F.2d 1, 25-26 (D.C.Cir.1984) *cert. denied*, — U.S. —, 105 S.Ct. 1843, 85 L.Ed.2d 142 (footnotes omitted) (emphasis in original).

It is true, of course, that to require "*no* distinguishing facts between the instant case and existing precedent" would undermine the rationale behind the qualified immunity defense. The question remains however, to what extent the official involved must extend existing precedent to determine its potential applicability to his situation.

Fortunately, the Supreme Court has given some guidance in this regard. Generally speaking, officials are not required to "anticipate subsequent legal developments, nor could [they] fairly be said to 'know' that the law forebade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738.

In *Mitchell v. Forsyth*, — U.S. —, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), the Court narrowed even further the government official's responsibility to predict the future course of the law. Plaintiff in *Forsyth* was an anti-war protestor who sued former Attorney General John Mitchell for alleged violations of the plaintiff's Fourth Amendment rights by authorizing a warrantless wiretap for reasons of national security. *Id.* — U.S. at —, 105 S.Ct. at 2808-09, 86 L.Ed.2d at 416-17. The district court rejected Mitchell's claim of qualified immunity. Even though warrantless wiretaps for national security purposes were not unlawful at the time of Mitchell's actions, the district court felt that the Supreme Court decision in *Keith*,[3] forbidding such wiretaps, was "merely a logical extension of general Fourth Amendment principles and in particular of the ruling in *Katz*,[4] . . ." in which the Court first outlawed warrantless wire taps in general. *Forsyth*, — U.S. at —, 105 S.Ct. at 2811, 86 L.Ed.2d at 419 (citations omitted).

The Supreme Court reversed the district court, finding that

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3. *United States v. United States District Court (Keith)*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972). *Keith* was decided after Mitchell's allegedly unlawful conduct.

4. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

> whatever the agreement with the Court's decision and reasoning in *Keith* may be, to say that the principle *Keith* affirmed had already been "clearly established" is to give that phrase a meaning that it cannot easily bear. The legality of the warrantless domestic security wiretap Mitchell authorized in November 1970, was, at that time, an open question, and *Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted. The District Court's conclusion that Mitchell is not immune because he gambled and lost on the resolution of this open question departs from the principles of *Harlow*. Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected.

Id. — U.S. —, 105 S.Ct. at 2820, 86 L.Ed.2d at 431 (footnotes omitted).

With these principles in mind, the court now turns to the question of whether plaintiff had a "clearly established" right to pre-seizure notice and a hearing.

Right to Pre-Seizure Notice and a Hearing.

Plaintiff argues that, at the time FmHA repossessed his cattle in 1980, there existed a "clearly established statutory or constitutional right" to notice and a hearing prior to any FmHA action such as that involved here. Defendants, however, claim that they relied on the self-help provisions of the U.C.C.,[5] which have generally been up-

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5. The relevant provisions of the U.C.C. are found at S.D.C.L. §§ 57A-9-503, 57A-9-504(3). SDCL § 57A-9-503 provides, in pertinent part, that "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession of a secured party may proceed without

(Continued on following page)

held as lawful. *See Bichel Optical Laboratories, Inc. v. Marquette National Bank,* 487 F.2d 906 (8th Cir.1973); Brodsky, Constitutionality of Self-Help Repossession Under the Uniform Commercial Code: The Eighth and Ninth Circuits Speak, 19 S.D.L. Rev. 295 (1973).[6] While it is true that *Bichel* dealt with a commercial lender, and not an agency of the federal government, defendants argue that they were not on notice in 1980 that FmHA would be treated differently than a private lender. Since commercial self-help, which FmHA believed it was entitled to utilize, had not been declared unlawful, defendants argue that their actions in March of 1980 violated no "clearly established" rights of the plaintiff.

Plaintiff contends that the availability of due process is a cornerstone upon which this country was built. "The Plaintiff urges that the complete lack of notice and no opportunity to respond to the evidence against him violated the established, settled law in 1980 that when a protected

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(Continued from previous page)

judicial process if this can be done without breach of the peace or may proceed by action." SDCL § 57A-9-504(3) provides, in pertinent part, that "[u]nless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale . . ." must be given.

6. Although the self-help provisions of the U.C.C. have been declared unconstitutional in at least two cases, *Watson v. Branch County Bank,* 380 F.Supp. 945 (W.D.Mich.1974), *rev'd without opin.* 516 F.2d 902 (6th Cir.1975); *Boland v. Essex County Bank & Trust Co.,* 361 F.Supp. 917 (D.Mass.1973), those were "exceptional cases. A greater number of decisions have held that repossession under the provisions of the U.C.C. does not entail state action." Cook & Sobieski, 2 *Civil Rights Actions* ¶ 7.27[B] at 7-151. (1985) (footnote omitted. See *infra* note 10.

property interest is involved[,] prior to deprivation the individual must be afforded some rudiments of due process . . .'"[7] Response to Defendants' Motion for Summary Judgment at 6 (filed July 13, 1984). In order for a constitutional guarantee applicable to a particular situation to be clearly established, however, it is "clear that the right at issue can[not] be defined . . . so broadly as to parrot the language in the Bill of Rights. . . ." *Hobson*, 737 F.2d at 26. Such a reading of *Harlow* "would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that *their* conduct is problematic." *Id.* (emphasis in original). Thus, this broad claim cannot "clearly establish" the rights plaintiff asserts.

Arcoren next argues that the Supreme Court's decision in *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970), clearly established his right to pre-seizure notice and a hearing. In *Goldberg*, the Court held that only *pre-termination* notice and a hearing afforded a welfare recipient procedural due process, because "termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." *Id.* at 264, 90 S.Ct. at 1018 (emphasis in original). Arcoren claims that FmHA loan programs are predominantly a form of social welfare legislation, see *Coleman v. Block*, 562 F.Supp. 1353 (D.N.D.1983) (preliminary injunction), 580 F.Supp. 194 (1984) (permanent injunction); *Curry v. Block*, 541 F.Supp. 506 (S.D.Ga.1982) *aff'd.* 738 F.2d 1556 (11th Cir.1984), and thus the FmHA is subject

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7. *See Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976); *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

to the holding in *Goldberg*. Although plaintiff argues that the *Coleman* and *Curry* decisions were no "revelation" to the FmHA, the fact remains that prior to those decisions, FmHA had reasonably relied on its status as a quasi-commercial lender in order to take advantage of the self-help provisions of the U.C.C. Even if the requirement of pre-seizure notice and a hearing is a "logical extension" of *Goldberg*, the FmHA was entitled to "gamble", *Forsyth*,— U.S. at —, 105 S.Ct. at 2820, 86 L.Ed.2d at 431, that as far as its farm lending practices were concerned, it would be treated as a commercial lender, rather than a *Goldberg*-type welfare agency. Assuming[8] that the FmHA may have subsequently "lost" its gamble, *Coleman*, 580 F.Supp. 194, *Curry*, 541 F.Supp. 506, that does not deprive it of qualified immunity.[9] *Forsyth*,—U.S. at —, 105 S.Ct. at 2820-21, 86 L.Ed.2d at 431.

Plaintiff also contends that *Fuentes v. Shevin*, 407 U.S. 67 (1972) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) clearly establish his right to pre-seizure process. In *Fuentes*, the Court struck down Florida and Pennsylvania replevin statutes as lacking due process, because they provided for no pre-seizure notice to the debtor and the creditor was not required to make any factual showing in support of his contention that he was entitled to possession. 407 U.S. at 82-83, 93, 92 S.Ct. at 1995, 2000. The *Sniadach* decision similarly

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8. The court need not and does not decide what due process, if any, the FmHA must afford its borrowers in the circumstances presented by this case.

9. Even if it were clearly established in 1980 that FmHA programs were social welfare legislation, it is *not* clear that *Goldberg* would be extended to the FmHA. See *Mathews*, 424 U.S. 319, 96 S.Ct. 893.

outlawed garnishment statutes which provide no prior notice to the garnishee. *Sniadach*, 395 U.S. at 340-42, 89 S.Ct. at 1822-23.

Neither *Fuentes* nor *Sniadach* outlawed self-help such as is provided for in U.C.C. § 9-503. There is some doubt that, if given the opportunity, the Court would extend *Fuentes* and *Sniadach* to statutory self-help provisions.[10] Further, even if a ruling such as plaintiff urges were the next "logical step" in the progression of due process law, defendants were once again entitled to proceed on the assumption that such an extension would not take place.[11] *Forsyth, supra; see Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974).

Finally, plaintiff contends that defendants violated his "clearly established" statutory rights under SDCL § 57A-9-504(3)[12] and 7 CFR § 1962.42(c)(5).[13] It is "clearly estab-

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10. *See United States v. Whiting Pools, Inc.*, 462 U.S. 198, 206 n. 14, 103 S.Ct. 2309, 2314 n. 14, 76 L.Ed.2d 515 (1983); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 n. 13, 94 S.Ct. 1895, 1905, n. 13, 40 L.Ed.2d 406 (1974); *Fuentes*, 407 U.S. at 103, 92 S.Ct. at 2005 (White, J., dissenting); *Brodsky*, 19 S.D.L. Rev. at 301-02.

11. The foregoing discussion is not intended as any indication of the role which state action may or may not play in federal Constitutional tort analysis. Rather, its purpose is to demonstrate that, no matter what analytical approach is taken, there was no clearly established right to notice and a hearing prior to the FmHA's repossession of Arcoren's cattle in March, 1980.

12. See supra note 5.

13. 7 CFR § 1962.42(c)(5)(i) provides, in pertinent part, that "[n]otice of public or private sale of repossessed property *when required* will be given to the borrower . . . ." (Emphasis added). Notice is not required if the sale involves collateral of "a type customarily sold on a recognized market. . . ." 7 CFR § 1962.42(c)(5)(i)(A) (1980).

lished", plaintiff argues, that cattle are not collateral of a type "customarily sold on a recognized market." Arcoren cites *United States v. Mid-State Sales,* 336 F.Supp. 1099 (D.Neb.1971); *State Bank of Towner v. Hansen,* 302 N.W.2d 760 (1982) and *Wippert v. Blackfeet Tribe,* 695 P.2d 461 (Mont.1985), in support of his argument. None of the cases cited, however, "clearly establishes", as of March, 1980, that cattle are not collateral of a "type customarily sold on a recognized market." *Mid-State Sales Co.* held that cattle were not "perishable" within the meaning of U.C.C. § 9-504 (3), but said nothing about the issue presented here. 336 F.Supp. at 1103. *Hansen* and *Wippert,* although they both held that cattle are not collateral of a "type customarily sold on a recognized market", were decided after March, 1980. In addition, two state court cases, from states other than South Dakota, can hardly be said to "clearly establish" the law applicable here. Defendants therefore violated no "clearly established" statutory rights of the plaintiff.

CONCLUSION

Although the law was apparently headed in the direction of requiring notice and a hearing prior to FmHA repossession of collateral, it cannot be said that the law was "clearly established" on that point in March, 1980. Similarly, it is not clear that the defendants violated the U.C.C. or their own regulations, as they stood in 1980. Having violated no clearly established statutory or constitutional rights of plaintiff, the individual defendants must be dismissed on the basis of qualified immunity.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

TERRY L. ARCOREN Plaintiff, vs. WENTON PETERS AND JOHN SCHOOLER Defendants.	CIV. 83-3017 PARTIES' STIPULATION OF UNCONTESTED FACTS

Yvette Hall War Bonnet and Nora K. Kelly, Attorneys for the Plaintiff, and Robert Mandel, Assistant United States Attorney, attorney for the Defendants, hereby stipulate and agree as follows:

1. On December 26, 1976, Terry Arcoren received a Farmers Home Administration (FmHA) loan in the amount of $18,000. Those funds were used to purchase a pickup truck and 36 head of cattle.

2. On May 11, 1977, Terry Arcoren signed a security agreement which gave FmHA a security interest in Terry Arcoren's farm equipment and replacements, all crops on 2320 acres of Range Units 76 and 118, located on the Rosebud Indian Reservation, Todd County, South Dakota, and all livestock.

3. A subsequent FmHA operating loan in the amount of $800 was made to Terry Arcoren on May 15, 1978, for the purchase of a bull. Both of these loans were to be repaid in seven (7) year installments commencing January 1, 1977, and January 1, 1979, respectively.

4. On January 1, 1979, Terry Arcoren failed to make in full his scheduled payments on his original loan and the subsequent loan of $800.

5. On May 8, 1979, Defendant Wenton Peters, a County Supervisor for FmHA, wrote a letter to Terry Arcoren requesting that he call Defendant Peters about his FmHA loan.

6. On July 17, 1979, Defendant Wenton Peters wrote two letters to Terry Arcoren requesting that he contact Defendant Peters about the care of his livestock. The first letter was sent by regular mail. The second letter was sent by certified mail and requested that Terry Arcoren contact Defendant Peters by the morning of August 3, 1979.

7. The certified receipt for the second letter, dated July 17, 1979, shows that Terry Arcoren received the certified letter on August 3, 1979.

8. On September 17, 1979, Defendant Wenton Peters wrote a letter to Terry Arcoren informing him that Defendant Peters would count his cattle on September 27, 1979.

9. Defendant Wenton Peters went to St. Francis, South Dakota, on September 28, 1979, to count Terry Arcoren's cattle. However, he returned to his office without seeing the cattle because neither Terry Arcoren nor John Arcoren were present due to a prairie fire in the vicinity of St. Francis, South Dakota. Defendant Peters saw the smoke from this fire.

10. On October 17, 1979, Terry Arcoren and his father, Charles Arcoren, made a visit to Defendant Wenton

Peters' office. At that visit Terry Arcoren paid Defendant Peters $6,418.00 on his FmHA loans. This payment paid in full his two loan installments, due on January 1, 1979, and paid in full the two payments due on January 1, 1980.

11. Terry Arcoren's next loan installments were due on January 1, 1981.

12. On or about March 17, 1980, and March 25, 1980, Richard Hand and John Arcoren, Sr. made visits to the office of Defendant Wenton Peters. These individuals claimed that they were providing all the care for Terry Arcoren's cattle and had been for some months.

13. In the first visit, Richard Hand and John Arcoren, Sr., told Defendant Wenton Peters that they would turn Terry Arcoren's cattle out onto the road if some action was not taken against Terry Arcoren.

14. In the second visit these individuals told Defendant Peters that they had placed Terry Arcoren's cattle in a corral for FmHA to repossess.

15. On March 25, 1980, Defendant Wenton Peters contacted his supervisor, Defendant John Schooler, a District Director for FmHA, and received Schooler's concurrence that Terry Arcoren's cattle should be repossessed and sold.

16. Neither Defendant Wenton Peters nor any other employee of FmHA attempted to verify with Terry Arcoren the allegations made by Richard Hand and John Arcoren, Sr.

17. Terry Arcoren's cattle were repossessed on March 27, 1980, and taken to the Winner Livestock Auction.

18. Terry Arcoren's cattle were sold on March 28, 1980.

19. Prior to April 1, 1980, neither Defendant Peters nor any other employee of FmHA notified the borrower, Terry Arcoren, of the repossession of his cattle or the subsequent sale of the cattle.

20. Terry Arcoren's only notice of the repossession and sale arrived on or about April 1, 1980, from the Winner Livestock Auction Company in the form of a copy of a bill of sale for 20 head of cattle at a price of $9,490.80. Terry Arcoren immediately called Defendant Wenton Peters about this bill of sale, at which time Defendant Peters asked him to come in to co-sign the check from the sale barn.

21. The amount of $9,068.34 was applied to Terry Arcoren's account with FmHA.

22. Defendant Peters sent Terry Arcoren a notice of acceleration on April 28, 1980.

By stipulating to the above facts the parties agree that the facts are true. However, the parties waive no sections to the relevance of the stipulated facts.

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Supreme Court, U.S.
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MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1069

Supreme Court of the United States

OCTOBER TERM, 1987

TERRY L. ARCOREN, PETITIONER

v.

WENTON PETERS AND JOHN SCHOOLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

IEF FOR THE RESPONDENTS IN OPPOSITION

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Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Iarch 1980 it was "clearly established,"
ing of *Harlow* v. *Fitzgerald*, 457 U.S. 800,
the Due Process Clause bars the Farmers
tration from using self-help remedies
ate secured creditors to repossess and sell
cures a debt.

Opinions below .....
Jurisdiction .....
Statement .....
Argument .....
Conclusion .....

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(1980) .....

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III)

In the Supreme Court

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1-29) is reported at 829 F.2d 6
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uth Dakota during
. He received two
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repossession on April 1 when he received
of sale for the cattle. *Id.* at 3, 49.

Petitioner pursued administrative rem
FmHA for redress of what he believed to
repossession of the loan collateral. See 7
(1980). When petitioner failed to obtain
menced this action against Peters and S
damages for alleged violations of due
guaranteed by the Fifth Amendment. C
Unknown Named Agents of Fed. Bure
403 U.S. 388 (1971). Petitioner claimed th
stitutional right to a hearing prior to the
sale of property covered by the security
that Peters and Schooler had violated
repossessing and selling the cattle withou

The district court held that the two FmH
entitled to immunity under the standard
Court's decision in *Harlow* v. *Fitzgeral*
(1982).[1] It concluded that "[a]lthough t
parently headed in the direction of requi
hearing prior to FmHA repossession of c
not be said that the law was 'clearly esta
point in March, 1980" (Pet. App. 60). Th
that the Uniform Commercial Code auth
to use self-help to take possession of colla
that a debtor defaults on his obligations
agreement and that prior notice to the de

[1] The district court initially held that petitioner
a *Bivens* action because the administrative remedi
tioner precluded the recognition of a *Bivens* actio
The court of appeals reversed that determinatio
availability of administrative remedies, "under
stances of this case, does not defeat an action bro
the fifth amendment to the United States constitu
141 (1985)). The court of appeals remanded the c
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The court of appeals noted that this Court in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), invalidated on constitutional grounds two state statutes authorizing the prejudgment seizure of property without notice to the property holder. This Court concluded that "due process requires 'an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another' " (Pet. App. 6, quoting *Fuentes*, 407 U.S. at 80 (emphasis in original)). The court of appeals observed that subsequent decisions had declined to extend *Fuentes* to self-help repossession by private creditors; "[t]hus, if a private creditor had financed [petitioner's] loan, the creditor would have been entitled under [state law] to take possession of the property without notice or a hearing in the event of default, and [petitioner] would have no claim that his constitutional rights were violated" (Pet. App. 7 (footnote omitted)).

The court then proceeded to reject petitioner's argument that the law in 1980 clearly established that the FmHA could not invoke the self-help statute to the same extent as a private creditor: "We do not believe that the cases clearly establish this proposition even as of today, much less as of 1980" (Pet. App. 7). The court stated that "strong authority" supported the FmHA employees' position that "when the FmHA acted as a lender, it acted in a commercial rather than a sovereign capacity." *Ibid.*, citing *United States* v. *Kimball Foods, Inc.*, 440 U.S. 715 (1979). The court acknowledged that the Due Process Clause applies to the FmHA's actions, but concluded that the nature of the governmental function and the fact that the agency was exercising its authority under the security agreement distinguished the present situation from *Fuentes*. It added that in cases involving government-owned corporations, courts had concluded that self-help remedies could be utilized without prior notice. Because there was a

" 'legitimate question' as to what process was due [petitioner] in these circumstances," the court concluded that the FmHA employees did not violate clearly established law by invoking the statutory self-help remedy. Pet. App. 12.[2]

Two judges dissented. They concluded that petitioner had a clearly established right to a pre-repossession hearing at the time of the events at issue in this case. Pet. App. 15-29.

ARGUMENT

Petitioner's arguments before this Court are based on a complete misreading of the court of appeals' opinion. Contrary to petitioner's repeated claims (see, *e.g.*, Pet. 7, 8, 17), the court of appeals did not hold that an individual in petitioner's position has no due process right to a hearing prior to repossession of goods by the FmHA. The court simply held that such a right was not clearly established in 1980 (Pet. App. 2, 12). That narrow determination does not conflict with any decision of this Court or another court of appeals. Review by this Court is not warranted.

1. The scope of the immunity from personal liability available to executive government officials such as respondents is well established: "[G]overnment officials per-

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[2] The court of appeals also rejected petitioner's claims for damages based upon the provisions of the security agreement, the FmHA regulations, and South Dakota law, observing that "[a] *Bivens* action for damages * * * must be founded upon a violation of constitutional rights" (Pet. App. 12). It further stated that "there is no provision [in the statutes, regulations, or security agreement] that clearly establishes the right to notice and hearing *before* FmHA officials could determine that [petitioner] was in default" (*id.* at 13 (emphasis in original)). Therefore, "the provisions cited by [petitioner] do not bear upon the constitutional analysis concerning what process was due" (*id.* at 15).

forming discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); see also *Anderson* v. *Creighton*, No. 85-1520 (June 25, 1987), slip op. 3. The Court recently defined the circumstances in which a right is "clearly established," explaining that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right" (*Anderson* v. *Creighton*, slip op. 4). Although the precise conduct need not have previously been held unlawful, "in the light of preexisting law the unlawfulness must be apparent" (*id.* at 5).[3]

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[3] Petitioner asserts (Pet. 19-23) that the court below applied the wrong standard in assessing respondents' entitlement to immunity, but petitioner has confused the immunity standard with the application of that standard to the particular facts of this case. The court of appeals plainly applied the correct standard. It quoted the pertinent portion of *Harlow* (see Pet. App. 4-5), and proceeded to determine whether the right claimed by petitioner was clearly established at the time of the challenged conduct (see *id.* at 5-12).

Petitioner asserts (Pet. 21) that the court of appeals created a new immunity rule that "depends upon whether the nature of [the official's] actions is sufficiently 'private' so as to relieve him of an obligation to comply with the Constitution." But the court of appeals created no new immunity rule. It found the quasi-commercial nature of the challenged conduct germane in assessing the scope of the relevant constitutional right, concluding that the manner in which the Due Process Clause applied to commercial activities undertaken by a government entity was uncertain in March 1980 and that, therefore, respondents were entitled to immunity (Pet. App. 7-12). Petitioner also states (Pet. 22) that respondents should not be entitled to immunity on the court of appeals' view of the case because immunity is available only for government actions. Contrary to petitioner's contention, the court of appeals recognized that respondents' conduct amounted to governmental action (see, *e.g.*, Pet. App. 8); the court

e court of appeals correctly applied that standard to
nstitutional claim asserted by petitioner in this case.
threshold matter, petitioner has pointed to no deci-
ssued prior to March 1980 that addresses the precise
on presented in this case. Indeed, petitioner
wledges that no decision "explicitly [struck] down
elp repossession by government officials as un-
tutional" (Pet. 15).

ther was the unlawfulness of respondents' actions
rent" in light of then-settled legal principles. At the
f the events at issue here, an unreconciled tension
l between two generally recognized propositions.
this Court had held that prior notice and an oppor-
to be heard were constitutionally required in con-
n with some government actions effecting a deprива-
f property. In *Goldberg* v. *Kelly*, 397 U.S. 254
, the Court held that a recipient of welfare benefits
e afforded an evidentiary hearing prior to the ter-
on of such benefits. And in *Fuentes* v. *Shevin*, 407
7 (1972), the Court invalidated two state statutes
izing the seizure of property without notice to the
ty holder, holding that due process required notice
opportunity for a hearing prior to the seizure of the
ty.[4]

nd, it was well established that, in some circum-
, a secured creditor may use self-help to repossess
ral from a defaulting debtor. See U.C.C. § 9-503;
p. 6-7. Several courts, including the Eighth Circuit,

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oncluded that the Due Process Clause might apply differently
commercial activities such as those at issue here.

he other hand, in *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600
the Court upheld the constitutionality of a state statute
ing the issuance of an ex parte sequestration order that
a property owner of the possession of personal property
any prior notice or opportunity for a hearing. Thus, the scope
uentes rule was not completely clear.

concluded that *Fuentes* did not apply in this context hat private creditors were therefore free to use self- remedies without providing prior notice and an op- nity for a hearing. *Bichel Optical Laboratories, Inc. arquette National Bank*, 487 F.2d 906 (8th Cir. 1973); App. 6-7.

titioner has not pointed to any authority that made it arent" in March 1980 that the FmHA's use of the self- remedy should have been analyzed under the first of principles rather than the second.[5] Indeed, what ority there was at the time indicated that the FmHA d make use of the self-help remedy to the same extent in the same manner as a private creditor. In *United es* v. *Kimball Foods, Inc.*, 440 U.S. 715, 737 (1979) tion omitted), this Court characterized the FmHA as a asi-commercial lender,' " and held that the priority to ccorded an FmHA lien should be determined by refer- to general state priority rules; the Court declined to te a special priority rule similar to that accorded to tax because the "[g]overnment * * * is in substantially same position as private lenders" (*ibid.*). Although the acterization of the FmHA's actions for due process

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Petitioner cites (Pet. 14-15) everal district court decisions, but of those decisions addresses the process due in connection with FmHA's use of self-help repossession remedies; they all concern ue process requirements applicable to mortgage foreclosures. Ac- ingly, those cases do not supply clear guidance as to the ap- ble rule in the self-help repossession context. The relevance of e cases is further diminished by the fact, recognized by the court w (Pet. App. 8-10), that several courts of appeals had reached the rary conclusion regarding the need for prior notice and an oppor- y to be heard in the related context of mortgage foreclosures by rnment-owned corporations. See note 6, *infra*. Finally, one of the s cited by petitioner—*Rau* v. *Cavenaugh*, 500 F. Supp. 204 .D.)—was not decided until November 1980, more than seven ths after the events at issue in this case.

ously a different question from the issue in *Kimball Foods*, the Court's conclusion closely resembles a private lender and l be governed by the priority rules ap- te lenders certainly makes less "apparent" hat self-help remedies available to private not be available to the FmHA.[6]

most striking evidence that the right ioner was not clearly established in March n the views of the judges who considered Nine of eleven judges of the court of ap- t court concluded that the constitutional petitioner was not clearly established at e, and the court of appeals stated that "it for us to hold that in 1980 the law was ed that the FmHA officials could act as App. 12). It is implausible in the extreme

appeals found (Pet. App. 8-10), this conclusion is by several appellate decisions analogizing corporations to private lenders for the purpose of uisites of due process in connection with those en- nortgage foreclosures. See *Warren* v. *Government Ass'n*, 611 F.2d 1229 (8th Cir.), cert. denied, 449 *oberts* v. *Cameron-Brown Co.*, 556 F.2d 356 (5th p v. *Federal National Mortgage Ass'n*, 527 F.2d 23 ese courts relied in large part upon the fact that the performed by government-owned corporations government itself. But they also found significant ght to foreclose flowed from a provision contained t: "As a party to the contract, and even though it lly-owned and authorized entity, [the government-] had a right to resort to its contractual remedies ate entity had." *Warren*, 611 F.2d at 1234; see also 2d at 32. Officials such as respondents could that the same rule applied to the quasi-commercial HA, especially in the absence of any authoritative ning the two situations.

that the federal clearly a reason

2. P below *Agricul* class a FmHA of appe a preli the liti minati were li foreclo had no ty to b

The tion i the ap foreclo the d was c factu sessio

[7] Pe the pr mary concl tually his pr such origi have *tiona*

whelming majority of a group of sitting
should fail to recognize a legal right so
hed as to be chargeable to the knowledge of
ublic official.[7]

er contends (Pet. 17-18) that the decision
s with *Johnson* v. *United States Dep't of*
34 F.2d 774 (11th Cir. 1984). *Johnson* was a
allenging the procedures employed by the
-judicial mortgage foreclosures. The court
d that the district court should have granted
injunction barring such foreclosures while
as underway. In connection with that deter-
court of appeals found that the plaintiffs
succeed on the merits of their claim that the
iolated due process because the plaintiffs
rovided with prior notice and an opportuni-
(see 734 F.2d at 782).

n *Johnson* bear no relationship to the ques-
esent case. *Johnson* addressed the merits of
n of the Due Process Clause in the mortgage
ntext; the issue in the present case is whether
ss rule applicable to self-help repossession
tablished in 1980. The difference in the two
ts—mortgage foreclosure as against repos-
fficient to distinguish the two cases. Bu

ntends (Pet. 14 n.2) that factual disputes regarding
repossession in this case precluded an award of sum-
n favor of respondents. The district court correctly
ver, that it is immaterial whether petitioner was ac-
because "[petitioner] seeks relief for deprivation of
out prior notice and hearing. It is undisputed that no
earing were provided" (Pet. App. 49 n.2 (emphasis in
t it another way, the fact that the repossession might
ful has no bearing upon whether petitioner's *constitu-*
ior notice and hearing was clearly established.

mental distinction. *Johnson* ticular constitutional claim, ere likely to succeed on the resent case is limited to the s are entitled to immunity; t by determining the correct rse taken by the court in the state of the law in March 0 rule would be found to be ons, there is plainly no con- ns.

USION

certiorari should be denied.

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